EQUITY CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH-CAROLINA.

June Term, 1834.

WILLIE PERRY, *Ex'r. of* STEPHEN OUTERBRIDGE,

v.

MARY MAXWELL, *Ex'rx. of* JAMES MAXWELL, *et al.*

A bequest of "all the notes of hand, that will be remaining after paying off all the legacies hereinbefore given, which I suppose will be from Twenty to Thirty Thousand Dollars," is specific, and the legacy is to be applied to the payment of the general legacies, only in the event of the undisposed of residue, being insufficient for their discharge.

Stephen Outerbridge died in the year 1824, having made and published his will which was proved by the plaintiff and by the testator of the defendant *Mary*, the executors therein appointed. This will was as follows:

"First of all, it is my will and desire that all my just "debts be paid. Secondly, I do hereby give and bequeath "to my grand daughter *Joseph Ann S. Johnson*, formerly "*Joseph Ann S. Outerbridge*, a small tract of land lying &c. "and I do hereby give and bequeath unto my said grand "daughter *Joseph Ann S.* three thousand nine hundred "and seventeen dollars in *notes to be taken out of my notes*, "by my Executors hereafter named, and paid over to "my said grand daughter *Joseph Ann, as soon* after my "death as it can conveniently be done. I do further "give and bequeath unto my said grand daughter *Joseph* "*Ann S. Johnson*, formerly *Joseph Ann S. Outerbridge*, "unto her and her heirs forever, all the furniture with the "clock that was in my house at the time of the death of

June, 1834.

Perry v. Maxwell.

"my wife, to be delivered shortly after my death. I do "hereby give and bequeath to my nephew, *Stephen Out-*"*erbridge*, one thousand five hundred dollars, to him and "his heirs forever, to be paid to him by my Executors, "as soon after my death as they can collect it; but "in case my said nephew is willing to receive that "amount in good notes, he can do so. If my sister-"in-law, *Drucilla Outerbridge*, formerly wife of my "brother *Ben*, should not get married before my "death, I do by these presents give unto her and her "heirs forever, three hundred and fifty dollars, to assist "her in supporting her children &c. but if she should "get married, as aforesaid, this gift to be void. I do "give and bequeath unto my neice *Nancy Wherton*, for-"merly *Nancy Ballard*, two hundred and fifty dollars, "to her and her heirs forever. I do give and bequeath "unto my niece *Polly Ballard*, wife of *Silas*, two hundred "and fifty dollars to her and her heirs forever, all of which "it is my will and desire that my Executors shall pay "over to my said sister-in-law and my two nieces, as "soon after my death as they can collect the money."

"Whereas, I have fifty shares in the State Bank of "North Carolina, nineteen shares in the Bank of Cape "Fear, and seven shares in the Newbern Bank, making "seventy-six shares in all: It is therefore my will and "desire, that my daughter *Sally M. Fenner*, shall have "the profits arising therefrom during her natural life or "until the charters of said Banks may expire. I do there-"fore by these presents leave the said seventy-six shares "on trust with my Executors or either of them, and I "do hereby authorise and empower them or either of "them to take charge of said Bank Stock, and to draw "the dividends as they shall become due and payable; "and the said dividends when drawn by my said executors "or either of them shall be paid over to my said daughter, "*Sally M. Fenner*, for her own use and comfort. When-"ever the Charters of the said Banks shall expire (if "they should not be again renewed,) I do then give "and bequeath the said seventy six shares of Bank "Stock, which cost me seven thousand six hundred dol-

"lars to my said daughter *Sally M. Fenner*, to her and "her heirs forever. I do further give and bequeath un- "to my said daughter, *Sally M. Fenner*, twelve thous- "and four hundred dollars *in notes, to be paid to her by my "Executors as soon after my death as it can be convenient- "ly done;* that with the Bank Stock will make the sum of "twenty thousand dollars. I further give and bequeath "unto my daughter *Sally M. Fenner*, to her and her heirs "forever, the following negro slaves, viz: *Charles*, &c. I "do further give unto my said daughter, *Sally M. Fen- "ner*, and to her and her heirs forever, the tract of land "and the improvements and appurtenances, whereon I "now live. I do further give unto my said daughter, "*Sally M. Fenner*, to her and her heirs forever, all my "stock of horses, cattle, sheep and hogs, my carriages "and harness, saddles and bridles, with all the furni- "ture that was in the house, where Doctor *Richard H. "Fenner*, deceased, formerly lived, with the Piano and "Clock, except one bed and a few other articles that "did belong to said *Fenner*, and has been sold as his "property; all of which, I do give and bequeath to my "said daughter *Sally M. Fenner* to her and her heirs for- "ever—and I do also give and bequeath to my said "daughter, *Sally M. Fenner*, my wagon and ox-cart or "carts, with all my plantation utensils, Blacksmith's "tools, all my kitchen furniture, and also all the corn, "fodder, wheat, oats, rye, cotton, &c. that may be on "hand at the time of my death; and should there be a "crop pitched or growing at the time of my death, it "is my will and desire that the people should carry it "on, in the same manner as they did before my death, "and all that is made, I do give to my said daughter, "to her and her heirs forever.

"I do now give and bequeath to my four grand chil- "dren, who are the children of my said daughter, *Sally "M. Fenner*, namely, *Eugenia Ann, Richard Joseph, Cath- "arine Reavil* and *Stephen Outerbridge*, to them, and "their heirs forever, all the Notes of hand that will be "remaining after paying off all the legacies hereinbe- "fore given and bequeathed, which I suppose will be

JUNE, 1834.

PERRY v. MAXWELL.

"about from twenty to thirty thousand dollars worth; "all of which notes so remaining, I do fully and freely "give and bequeath to my said grand children to them "and their heirs forever. It is my will and desire, that "my said Executors take into their possession the said "notes, left as aforesaid for the use of said children, and "keep them at an interest altogether, that is, not to "have them divided, until the oldest child becomes of "lawful age or marries; then, whatever loss may be on "said notes, each of the children will have to bear their "equal part. If my Executors should at any time think "any of the children's notes to be doubtful, I hope they "will bring suit on such, and if negro property has to "be sold in any case to make payment, I do hereby au- "thorize and empower my said Executors to purchase "young negroes, at a price that they think will answer, "and then hire out what negroes they may purchase. I "do hereby further give and bequeath unto my said "grand children, *Eugenia Ann*, *Richard Joseph*, *Catha- "rine Reavil* and *Stephen Outerbridge*, to them and their "heirs forever, the following negroes, viz: *Eady*, *Nott*, "&c. In witness whereof, I have hereunto set my hand "and seal, this second day of October, in the year of "our Lord, one thousand eight hundred and twenty- "four."

The plaintiff in his bill stated, that the whole trust had, during the life of his co-executor *Maxwell*, been managed by the latter; that he had recently died, having appointed his widow, the defendant *Mary*, his executrix. That upon an attempt to settle the accounts of the trust fund with the defendant *Mary*, the plaintiff had met with difficulties which rendered it prudent that the settlement should take place under an order of the Court of Equity.

In specifying these difficulties, the plaintiff stated that at the death of the testator, there was to his credit on the books of the State Bank, the sum of $1354 55, which consisted of dividends upon his stock, which had been received by him, and transferred to his individual account. Besides which, there was standing on the divi-

dend book of the same Bank, the sum of $800, dividends upon the same stock, which he had never given a receipt for, and transferred to his individual account. That the dividends upon the Stock held by him in the Banks of Newbern and Cape Fear were in the same situation; in the former, to the amount of $228, and in the latter to that of $56; that these several sums, being the dividends upon the Stock bequeathed to *Sally Fenner*, the daughter of the testator, his co-executor, thinking her to be entitled to them as incidents to the principal legacy, had paid to her, and the defendant *Mary* claimed them as credits to her testator, which the plaintiff was advised it would be improper for him to allow.

The plaintiff then charged, that at the death of the testator, he had recovered a judgment against one *Benjamin F. Hawkins* and others, upon a note for $2600, which was collected by his co-executor; that it was contended by the next of kin of the testator (*Johnson and wife, and Jasper* who had married *Sally Fenner*, the daughter of the testator, and who were parties,) that there being no general residuary clause, this sum constituted a part of the undisposed of residue, and was to be distributed according to the Statute. But that it was claimed by the infant grand children of the testator, as being included in the legacy to them; and if not, then that it formed a proper fund for the payment in the first instance, of several of the smaller legacies given to the collateral relations of the testator; while, on the other hand, the next of kin contended that these legacies were a charge upon the notes of the testator, bequeathed to his grand children. The same question also existed as to the disposition to be made of the general residue of the estate.

Another difficulty arose from the fact, that the testator, a short time before his death, had taken out letters of administration upon the estate of *Richard Fenner*, the husband of his daughter *Sally*, and the father of the four infant legatees, and at the September County Court of Franklin, before the date of his will, had returned an account of sales whereby he charged himself with $1404,

JUNE, 1834.

PERRY v. MAXWELL.

which had been paid by *Maxwell* to the next of kin of the intestate, as a debt due them by the testator. But the next of kin of the latter disputed this payment, alleging that it was a debt due by the testator to his daughter and her children, and was discharged by the large legacy left them.

The plaintiff then charged that *Maxwell* had at March Term 1827, returned an account of his administration to the County Court of Franklin, in which, after paying sundry debts and legacies, and retaining the sum of $968 76 for his commissions, he had charged himself with the sum $54,785 74, being the residue of the testator's notes, of which $8,155 was interest. And that at March Term 1830, of the same Court, he had returned another account, in which after crediting himself with sundry other debts paid, and retaining $495 74 for his commissions, he has charged himself in favor of the infant legatees with the sum of $62,264 46, of which $7,478 was interest, which had accrued since the return of the first amount. The plaintiff stated that *Maxwell* had in the management of the fund in his hands, performed the duties of guardian to the grand children of the testator, and that the above charges of commissions included his compensation for those services; and the plaintiff prayed the Court to declare whether *Maxwell* and himself were testamentary guardians of those children, and whether the above mentioned charges of commissions were correct. Connected with this subject, the plaintiff averred that *Maxwell* had, upon the idea of his being the guardian of the infant legatees, dealt with the notes and bonds bequeathed them as guardians, renewing them and compounding the interest so as affect them with usury, as the plaintiff feared in case it should turn out that he was not clothed with the powers of a guardian; and that the defendant, *Mary*, insisted upon her right to discharge the abovementioned balance of $62,264 46, by surrendering to the plaintiff the specific bonds or notes, which the latter admitted he was willing to receive, if they had not been affected with usury by the acts of her testator; and upon this point the opinion of the court was prayed.

Several minor points were made in the bill, and at the bar. The facts upon which they arose, need not be particularly stated, as they appear upon the opinion of the court.

While the cause pended in the court below, Mrs. *Maxwell* procured an order to be made, whereby the notes and bonds in her hands were placed in the master's office, and he was appointed a receiver to collect such of them as the plaintiff might direct. There was no dispute upon the facts, the answers being drafted merely to raise the questions upon which the parties differed.

Badger for the plaintiff.

Winston for the grandchildren.

W. H. Haywood for the executrix of *Maxwell* and for the next of kin.

RUFFIN, Chief-Justice.—The bill is filed by the surviving executor of the will of *S. Outerbridge*, against the next of kin, and some of the legatees of the testator and against the executrix of *J. Maxwell*, deceased, who was also one of the executors of *Outerbridge*. The object of it is to have the construction of the will in several particulars settled and also to be directed as to the principles upon which the complainant shall settle, with the representatives of his former co-executor, who in his life time transacted most of the business of the estate, and at the time of his death, had in his hands upwards of $60,000 belonging to it. It is a proper bill, as the points are all of them of some consequence to those interested, and some of them of sufficient difficulty to authorise the plaintiff to ask the advice of the court.

The will is exhibited and has no general residuary clause. The testator, nevertheless, left a considerable undisposed residue, as some of the parties contend, to be divided amongst his next of kin; and as others contend, to be applied in satisfaction of pecuniary legacies. While questions are also made, whether certain parts of the property are specifically disposed of, or fall into the residue.

The testator, by his will, gave to his daughter, *Sarah*

June, 1834.

Perry v. Maxwell.

M. Fenner, fifty shares of stock in the State Bank; nineteen in the Bank of Cape Fear, and seven in the Bank of Newbern, all which he owned at the date of his will, and of his death; on which he directs his executors to receive the dividends during the continuance of the charter and pay them to his daughter, and if the charters should not be renewed, then to transfer the shares to her. At his death, dividends had been declared on the Cape Fear Bank stock, to the amount of $228, which had not been paid to him, but stood to his credit in the dividend book of the Bank; this was also the case in the Bank of Newbern, to the amount of $56; and in the State Bank to the amount of $800. Besides that sum thus declared, in the State Bank, and standing on the dividend book, the sum of $1354 55, which had been before declared as dividends of that stock, had been transferred by the testator to his personal credit on the individual ledger as a deposit. Those sums were received by Mr. *Maxwell*, and under the idea that they passed with the stock bequeathed to Mrs. *Fenner*, he paid the same, (in the whole $2,438 55) to her. One of the questions between the parties is, whether these sums did so pass, or are undisposed of?

Dividends upon stock due at the death of the testator do not pass by a bequest of the stock itself.

It is very clear that the stock did not carry any part of the dividends in either Bank. As to the sum of $1354 55, that was no longer a dividend. It had been received and deposited again as cash, subject to the testator's check in the common course of business. The remaining sums were not precisely in that state, but they had been severed from the stock by being declared.—They were not profits accruing, but had accrued, and no more would pass then as a part of the stock, than a crop made on land and gathered, would, by a devise of the land. Upon a transfer of the stock to a purchaser, dividends declared do not follow, unless bargained for, and then the purchaser gets them in the name of his vendor. But the particular words of this will positively exclude the idea, for the executors are directed to receive the dividends as they shall become due, and payable for Mrs. *F.* These sums were therefore improperly paid to her under

a mistake, and she must account for them; and, in the event of her inability to do so, Mr. *Maxwell's* estate will be obliged to make them good, to the persons entitled to the benefit of the residue in the settlement of the estate.

In a will, the words "all my notes," include bonds as well as notes, but not judgments upon either.

At the death of the testator, he had obtained judgment on a bond given to him by *B. T. Hawkins*, which remained unpaid, and was inventoried by the executors, for the sum of $2504 12, due at July, 1820. It was received by Mr. *Maxwell*, and retained by him as part of the legacy to the testator's four grand children, *Eugenia*, *Richard*, *Calhoun*, *Stephen*, to whom he bequeathed "all his notes of hand." The claim to it is now made for the grand children, while the next of kin insist that it is not included in their legacy, but is undisposed of. Of this latter opinion is the court. *Notes of hand* may well include promissory notes, properly speaking, single bills and bonds. It is a name given generally by the unlearned, in common, to all those evidences of debts which are verified under the hand of the debtor, and which the creditor keeps. It is not an apt legal term to describe a debt by judgment; nor is it ever used in that sense as its popular one. This debt therefore falls into the residuum, and is to be accounted for as such.

The questions of the most importance to the parties, and of the greatest legal difficulty, relate to the disposition to be made of this residue. The testator's next of kin are Mrs. *Fenner* and Mrs. *Johnston*. To the latter he gives a legacy of $3,917, "in notes, to be taken out of my notes by my executors, and paid over to her as soon after my death as it can conveniently be done."—To a nephew *Stephen Outerbridge*, he bequeathed $1500 "to be paid as soon as the executors could collect it, but if he should choose to receive the amount in good notes he can do so." Then follow a conditional legacy of $350, to his brother's widow *Drucilla*, and a legacy of $250 to his niece *Polly*; which he directs the executors to pay to them, as soon as they can collect the money. The next legacy is to the daughter, Mrs. *Fenner*, of the Bank stock, which, he remarks, cost him $7,500. He

JUNE, 1834.

PERRY vs. MAXWELL.

adds, "I do further give to my said daughter $12,400 in notes, to be paid to her by my executors as soon after my death as it can be conveniently done, that with the Bank stock will make the sum of $20,000." In the same clause he proceeds to devise to her lands and bequeaths a number of slaves by name. He adds, "I further give to my said daughter all my stock of horses, cattle, sheep, hogs, with all the furniture at a particular house, and also my wagon, carts, with all my plantation tools, all my kitchen furniture, and the crops of corn," &c.

The next clause contains the disposition to the children of his daughter, Mrs. *Fenner*. It is, "I do give and bequeath to my four grand children, namely, *E. R. C.* and *S.* all the notes of hand that will be remaining, after paying off all the legacies herein before given, which I suppose will be about from twenty to thirty thousand dollars worth; all of which notes so remaining, I do fully and freely give to my said grand children. And I desire my executors to take into their possession said notes, left for the use of my grand children, and keep them on interest altogether, that is, not to have them divided until the oldest child becomes of age or marries, that whatever loss may be on said notes may fall equally on all." He then gives authority to the executors to take negroes for such of those debts as they might deem it necessary to call in, and hire them out, for the children; to whom he adds a legacy of a number of slaves by name.

A short time before the making of the testator's will, he administered on the estate of *Richard Fenner*, the late husband of his daughter, and the father of the four grand children to whom the foregoing legacies are given, and was indebted to them for their distributive shares in a sum which amounted to 1404 22, in 1828, when it was paid. It is contended for the next of kin, that those debts were satisfied by the legacies, and are not payable out of the residue. That all the legacies of the will are specific or expressly charged on the notes after the payment *thereout* of all the previous legacies, and by consequence; that the residue is only chargeable with the

other debts of his testator, and after satisfying them, is to be distributed by law, among the next of kin.

It is extremely probable from the large sum due to the testator, upon bonds and notes and his habits, as to be collected from his language throughout the will, of keeping his moneys at interest, that he contemplated on having very little of his substance in cash; and that he expected all his legacies to be paid either in securities, or in money to be collected on them, after his death. If this be true, he meant the disposition in favor of his grand children as it has been understod by the executors, as a residuary clause. That is, he thought it would in fact, pass all that such a clause would in law pass. But he has not so framed his will, as to allow the court latitude to adopt that construction.

The several questions made are therefore to be decided upon the particular terms of the several bequests.

A legacy by a debtor to his creditor, of the same nature with the debt, and of an equal or greater value, is *prima facie*, a payment of it.

It is true, that if one be indebted and give to the creditor a legacy of the same nature with the debt of a greater, or equal value, it is, under circumstances, taken to be a satisfaction. The rule is an old one, and cannot now be denied. It was adopted on the idea that it was the intention of the testator to pay the debt by the legacy; for certainly, like all other questions upon wills, the construction must be according to the intention.—

But the adoption of this rule hasbeen regretted and there are many circumstances which repel the presumption.

Hence many of the Chancellors have regretted the decision, and denied that it accorded with the intention; because there is no reason why a testator may not mean to give a bounty to one whom he owes, and also pay a debt to one for whom he feels kindness enough to make him a legatee. None have, however, ventured to decide against the rule, when the case fell clearly within it; as if the debt be for a certain sum of money, and the legacy, if an equal or larger sum of money, *simpliciter*, that is, payable unconditionally and immediately, or when the debt would be due. But regarding the intention to which the rule was formed as being but equivocal, any, the least circumstance, indicative of a contrary intention, or not consistent in point of justice with an intention of satisfaction, has been laid hold of

June, 1834.

Perry v. Maxwell.

to take a case out of the rule. The exceptions are now as well established as the original principle; so that that principle itself cannot be as properly stated in any way as by modifying it at once by the enumerations of the circumstances which control it; and numerous authorities were cited at the bar on each side, which it is unnecessary to notice particularly. They are collected and collated by Mr. *Roper* (2 *leg.* 38 *et seg.*) where the several distinctions are clearly explained, and the whole doctrine is very fully stated in the case of *Strong* v. *Williams* (12 *Mass. Rep.* 391.) It is now understood that express direction in the will for the payment of debts, requires the debt as well as the legacy to be paid; because the testator says that it is his intention. Both are also to be paid when either is contingent, and the other not; when they are payable at different times, the legacy, though larger, being at the later day; when the debt and legacy are of different natures, as if the the former be for a sum of money, and the latter be of specific things which may be destroyed, and thus the legacy lost; when the debt is contracted subsequently to the making of the will; or when the amount of the legacy is uncertain, and given as being uncertain. The rule itself ought to be now laid in these restricted terms. It may be said that a legacy is intended as a satisfaction of a debt in some cases; but in those above mentioned, it is not so intended.

As a general direction for the payment of debts, or if the legacy be contingent——or payable after the debt, or be specific or uncertain, or given after the debt is contracted.

To apply these principles to the question, whether the testator intended that the distributive shares of his daughter and grand children should not be paid to them? In relation to the grand children, the point is clear, upon many grounds. In the first place, the legacy throughout to them is specific, consisting of slaves *nominatim*, and all *the notes of hand* that will be remaining &c. If the testator had called in all his debts on bond and note, it would have been an ademption of the legacy. The question is not what he might possibly have intended, if he had known the case that happened to exist at his death; but what is to be inferred from the will, was his intention when he made it. It was

Especially it is repelled where the debt is contingent.

altogether uncertain what notes he would then have; and the legacy being specific, depended for its value and effect on that circumstance. So of the gift of a residue, because a residue is necessarily contingent, and may be altogether exhausted. This legacy is not only specific, but is residuary. It is not, it is held, the gift of a general residue; but the *remaining* part of the notes after the payment of other legacies. Confining it to the notes makes it specific, that is, a gift of the *corpus*, and the words following, "that may be remaining," constitute it a gift of them as a special residue. This also renders it uncertain; not because it might, as a general residue, be diminished by debts; but because the whole amount of notes specifically on hand might not be more than adequate to the payment of the legacies before charged on them. The testator says the amount was problematical, and might be ten thousand dollars, more or less. His estimate turned out to be nearly $30,000 too little; but it might have been as much too high. Again, this legacy is not payable until twenty-one, or marriage, and the children were young; whereas the debt, if any thing, was due immediately, or would be so in two years. For these reasons, the court entertains the opinion that the grand children were entitled to their legacy and also to their distributive shares. There are other reasons sufficient to authorise the same conclusions, which are equally applicable to the case of the grand children, and that of their mother, supposing her legacy of $12,400 to be a general pecuniary one. The testator, in the beginning of his will, expressly directs "all his just *debts* to be paid." Such a direction has been relied on as decisive, that there was no intention that what was called by the testator himself a gift, should be a payment. In some of the cases, the direction has been for payment of debts and legacies; but the *debts* is the material word, because giving the legacies imports that they are to be paid without a further special order, and in a late case, *Adams* v. *Lavender*, (1 *M'Clel. & Y. Rep. Exch.* 41,) the direction was confined as here, to the debts; and held not a satisfaction. There is another

JUNE, 1834.

PERRY v. MAXWELL

circumstance which is very strong with me. The testator returned his account of sales of *Fenner's* estate to September County Court, and made his will the second day of October following. The debt due to the distributees must have been altogether contingent in his mind; for there must be strong reasons to expect that every dead man is indebted more or less, and it was probable his intestate might owe the whole value of the small part of his estate which he sold. Besides, the testator could not contemplate these shares as debts due from him when he made the will. He had not settled the estate, or rendered any account to the next of kin. Upon his death, before any account thus ascertaining the estate, debts or distributive shares, he must have known that he would be accountable to the administrator *de bonis non* of his intestate, and not to his next of kin. Not only was the amount of the debt contingent, but its existence, as one owing by the testator to these legatees, was also contingent. In the event on which the legacy could alone operate a satisfaction, namely, the testator's death, he must know that in case he had not accounted the legatees would have no demand which they could enforce without a new administration. And there is no just ground for supposing that it was meant by the testator that the gifts of this will should be taken in discharge of what might turn out on a remote settlement with an administrator *de bonis non* to be the respective interests of the legatees in that fund. Unless the will contain something to shew the contrary, it is not to be presumed that the testator considered himself *debtor* to the next of kin for that estate at all, but only accountable for it to such persons including them, as might have demands against it while unsettled, or in it, when closed.

And where at the date of his will, the testator was an administrator, and upon his death without settling his administration, bound to account with an administrator *de bonis non*, legacies given by him to the next of kin of his intestate, are not payments of their distributive shares.

A legacy "in notes to be taken out of my notes and handed over, &c." is not merely a charge for its amount upon the notes of which the testator may be possessed; but is a specific legacy of securities hereafter to be ascertained.

The opinion of the court is therefore declared to be that the legacies to Mrs. *Fenner* and to the children, are not to be taken to be in satisfaction of any moneys which it happened, at the death of the testator or afterwards, they had a right to demand in respect of their distributive shares of the estate of *Richard Fenner*, de-

ceased, but that the said legatees have a right to the said legacies, and also to retain the money received by them on account of those distributive shares.

The next questions are upon the nature of the legacies to the other persons, besides the grand-children, upon which depends the fund out of which they are payable, that is, whether out of the residue generally, or out of the notes as specifically given.

It is our opinion, that the legacy to Mrs. *Johnson* is specific. The gift is indeed, not of a particular thing set apart as one individual *corpus*, by the testator, but it is of that nature. It is not absolutely a general legacy, so as to abate with mere pecuniary legacies, payable out of the residue. It is charged on a particular part of the estate, and therefore is not to fail, while that fund is sufficient to satisfy it. It is by the words not merely charged on that fund, but is to be paid, not in money to be raised from the fund, but in the securities themselves, which the testator might leave in specie at his death; and, if no such securities had been left, it must have failed. It is a legacy to a certain value "in notes, to be taken out of my notes as soon after my death as it can be done"—thus marking the very thing given. It is not marked so, that but one single thing of that kind owned by the testator would be within the description. But it is so marked, that nothing of the same kind, not owned in specie by the testator at his death, would satisfy it—nothing but "my notes." By which he denotes the whole of the very things, and then gives part of those particular and additional things to the legatee.

Upon this difference between the terms, in which this legacy is given and in which the others are expressed, arises the material dispute between the parties; for, if the other legacies are general legacies, they are payable out of the residue, and will exhaust it and thereby leave a larger amount of notes for the grand children; but, if specific, then they must be paid from and in the notes, and the residue will belong to the next of kin.

The leaning of the courts is against construing doubtful terms into a specific gift, because the gift is lost upon

June, 1834.

Perry v. Maxwell.

the failure of the fund, from any cause; and also, because it is not subject to the equitable principle of equality by abatement. It must be clear therefore, upon the will, that nothing is meant but a particular thing, or a part of a particular thing, existing in specie at the making of the will, or when it is to take effect. If the words will be satisfied by any thing of the same kind, not owned by the testator, the legacy is general. The difference may be illustrated by the common case of a contract to sell and deliver goods of a common kind, say one hundred barrels of corn, upon which the remedy is by action for damages, for not delivering and a contract to sell a certain hundred barrels, as a distinct parcel in a crib, which vests the property and gives trover or detinue upon refusal to deliver.

The legacies to the brother's widow and the niece, are purely pecuniary, and without reference to any funds, but are payable as soon as money from any source can be collected.

But one to be paid as soon as its amount can be collected, or if the "legatee is willing to receive that in good notes he can do so;" is a general legacy.

That to the nephew *Stephen*, is given in the same way, except that the testator adds, "that if he is willing to receive that *amount* in good notes he can do so." It is to be recollected that the rule is, that it must be manifest upon the whole will, that nothing but a gift in specie was intended. I have no doubt in my own mind, that this testator expected his nephew to receive either a part of the very securities left by him, or that the $1500 would be raised out of those very securities. But he has not given the legacy in that way, or tied it up by his words to any such contingency. It is left with the nephew to take the money, and therefore upon the failure of notes he would yet be entitled to the legacy. Moreover, although he certainly anticipated that if paid in notes, they would be selected out of those left by him, yet he has not said so, and therefore the legatee would not be confined to them. The case of *Sibley* v. *Perry*, (*7 Ves.* 523,) is a forcible illustration of the principle which governs the construction of this clause. That was a direction to the Executor, within three months after the testator's death, to transfer £1000 Stock, in the funds

styled the Three per cents consolidated annuities, to several persons. The testator then had the funds of that kind, from which and the particular words *transfer* and *in the*, the inference to the apprehension of every individual understanding is, that he had in his mind that very stock. Yet Lord *Eldon* held, that upon the general rule, it was a general legacy, because the testator had not in the will, appropriated the particular Stock, as his Stock, or by other means which would show that no other Stock held by him would do.

This reasoning goes also to the same conclusion as to the nature of the legacy of $12,400 to Mrs. *Fenner*. There is no election indeed, given to her, to take money or notes to the value, but she is to be paid in notes at all events. But the testator does not say in *his* notes. It may be admitted, that he expected her to be so paid—that the Executors would offer them, and that she would accept them, and that he was morally certain of leaving such. But she is not restricted to them, and if there had not been notes, there can be but little doubt, if the testator had admitted the thought of that event, he would not have considered, that thereby his daughter should lose her legacy. The words are—"in notes, to be paid by my Executors, as soon after my decease as it can conveniently be done"—which falls almost literally within *Sibley* v. *Perry*. This is the stronger here, because the testator had just before given a similar general legacy to his nephew, accompanied by other words, which clearly decide that he did not, in that instance, intend to give by those, a specific legacy; and because, in the legacy to Mrs. *Johnson*, and in that of the money, furniture, stock, wagons, &c. to Mrs. *Fenner*, he evinces a knowledge of the proper methods of making a specific legacy where he meant one, by the use of the possessive pronoun, *my*, to identify the fund. Upon the words of the bequests to these several persons therefore, it seems, upon authority, the legacies are general, and not specific.

So also is a legacy "in notes to be paid as soon after my death," &c. there being nothing to denote that any particular notes were intended.

It is however argued that the doubts upon those clauses as expressed, are removed by the manner in which the gift to the grand children is made. That is clearly spe-

And a subsequent bequest of "all the notes that will be remaining

June, 1834.

Perry v. Maxwell.

cific, and is of the notes "that will be remaining after paying off all the legacies herein before given, which I suppose will be from £20 to 30,000." The words, "*remaining after paying off all the legacies,*" are considered as referring the previous legacies so directly to the particular fund of which the remnant is thus specifically given, as to make those previous legacies consist of specific portions of the fund itself. Certainly, different fractions of the same *corpus* all will be specific. It is also true, that the general terms used in the prior gifts may be controlled and rendered specific in the disposition of each part, by such a reference in the gift of every one of the parts, as will shew an intention that each legacy was so much of the identical thing. As in *Sleigh* v. *Thorington*, (2 *Ves.* 561,) where the testatrix gave £2413 of South Sea Stock, or annuities in different proportions to several persons, and then gave to *A* "the remaining £13 13 South Sea Stock," and it was held that the legacies were specific by force of the words in the last gift, and that the deficiency could not be made up out of the general assets. The last words referred plainly to stock *then* standing in her name, that is, at the making of the will, as was evident from the exact balance, £13 13, being computed. That computation was incorrect; nevertheless, the making a comptuation, so as to exhibit a balance, true or false, shewed that she was only giving away that which then existed, or which she thought then existed; and as the last was of that character, the previous dispositions of parts of the Stock meant parts of that identical Stock. The whole force of the argument in that case rested upon the residue being stated as the exact residue of certain Stock then held by her. It can have no application to a case where the residue given is of the things of that sort which the testator might have in specie at his death, which must be altogether uncertain; nor to one, in which the testator shews in the Will, that he had made no computation, and that the residue given specifically may be more or less, according as it may be necessary to resort to it for the satisfaction of the prior claims of the legatees. Here

after paying off the legacies herein before given," will not make them specific, because the remainder being uncertain in amount, indicates that the charge upon them and not a fractional part of them, was intended.

the remainder is not given as a certain one, but expressly as being altogether uncertain. Besides the specific legacy of $3917, part of the notes, the other money legacies before that to the grand children amounted to $14,500. The giving over the residue of the notes, as being uncertain in amount, is demonstrative that the testator could not have considered that he had given away absolutely and definitely, as parts of the notes then held by him, that sum of $14,500, because in that case, the residue must have been certain, and could not have varied from twenty to thirty thousand. That variation could only arise by the general assets failing to a greater or less extent to meet those bequests, and thereby throwing them on the other fund for the various differences.

Executors charged with the management of legacies to infants are entitled to commissions upon the profits—but they take them *as executors*, to be divided according to their several degrees of labor; and upon the death of one who had possession of the fund, the survivor is not entitled to another commission.

The true sense, we think, is that the prior legacies are not of fractional parts of the things of which the residue is given to the grand children, but is a charge on the fund. The reasons which lead to this conclusion produce the further one that the charge is not specific and primary on that fund, but only that they are to be made good at all events. For the reason why that fund was uncertain was, that these legacies, certain in their amounts, might require portions of it, larger or smaller, as the other parts of the estate primarily applicable to them, should prove sufficient or insufficient.

We therefore declare it as our opinion, that the debt of *Hawkins* and the dividends and monies in the Bank constitute the undisposed residuum—that all the legacies, except those to Mrs. *Johnson* and the grand children, are general pecuniary legacies, to be paid out of the residuum in the first instance, and that proving inadequate, then out of the legacies to the grand children. Consequently, as Mr. *Maxwell* has applied notes to the value of $2438 55, belonging to the children, to pay the legacy of Mrs. *Fenner*, for which he had that sum in hand, of the residue, in the moneys received from the Banks, his estate must make that sum good to them, unless it can be collected again from Mrs. *Fenner*.

As to compensation to the executors, and the princi-

June, 1834.

Perry v. Maxwell.

ple on which it must be allowed, we are of opinion that they are to receive it as executors. It is not necessarily incidental to the office of an executor to take the management of legacies to infants, but it is incidental to the office to have such duties assigned. It is the common case of a trust to the executors of a fund to accumulate. They take *virtute officii*, and hence by renouncing the office, the trusts will be executed by others, without an assignment from the executors. The executors jointly fill the office, and the duty survives to the complainant.

Both are therefore together entitled to the commission given by law. Upon such an estate to be thus managed through a course of years, the highest commission is not more than an adequate remuneration for the labor and responsibility, if the trust be faithfully executed.—Thus far there has certainly been perfect good faith; and the executors are entitled to claim at once a reasonable proportion of the commissions. In what proportions it shall be divided, as between the executors themselves, it is impossible for the court to say, without directing an enquiry as to the actual past labour and risk performed by each, and that which will probably be incumbent, for the future, on the survivor. If the parties should be unable to settle it to their own satisfaction, such an enquiry will be directed at the instance of either. But the court cannot allow full and double commissions in a case of this sort, when the executors as co-executors took, and upon the death of one, the other, by his old office, acts exclusively. He gets no power by the other's death, but only loses his aid.

A gift by will, of a note, carries with it the interest due on it.

Certain other points are raised in the answers of some of the defendants. One is, whether the interest accrued on the debts due on bonds and notes in the life time of the testator, passed to the grand children? On this we have no doubt. The interest had not been severed, as the dividends on the Stock had. The *corpora*, the notes themselves, are given, and all passes that would pass by an endorsement, and there can be no question, that the assignee of a note past-due, is entitled to the interest as well as the principal, due at the time of the endorsement.

Another is, whether Mr. *Maxwell's* estate is responsible for the debt of *Robert H. Jones*, who has become insolvent? The debt was contracted with the testator himself, when the debtor was in fact greatly embarrassed and probably insolvent; but notwithstanding, in such good credit, that no security was required but his own bond. His credit continued good up to the time of his declared bankruptcy, and in the mean time, he renewed the bond and paid the interest punctually. It is to be recollected, that one part of the trust was to keep the fund at interest. There are therefore no losses in not collecting. The only ground on which it can be imputed, is in not increasing the security. Good faith is required from the executor and circumstances to prove that he acted in good faith. This case is fully established by the debtor's conduct and character, and the course of dealing with him by the testator himself, and by the discretion given by the will to the executors, as to calling in monies from those who were debtors, at the testator's death. We declare therefore, that the complainant must receive the bond of *Jones*, as part of the funds of the children.

An opinion upon the effect of compounding interest and including it in bonds taken to renew others, is rendered unnecessary, as we are given to understand, that pending this suit, all the debts upon which any difficulty would probably be made on that ground, have been paid into the hands of Mr. *Johnson*, the Receiver. We barely intimate, that although more troublesome, it would be safest to require payment of the interest annually and to re-invest it; and that the executor should also clothe himself formally with the office of guardian.

All the parties must pay their own costs, except the complainant, whose costs must be paid out of the fund, and the defendant, *Mary Maxwell*, whose costs, up to this time, must also be paid out of the fund in Court.

PER CURIAM—ORDER ACCORDINGLY.

June, 1834.

Levi Ward v. Larkin Stow *et al.*

A testator having directed that "the residue of my estate, real and personal, be divided amongst the heirs of my brother I, the heirs of my sister N, and the heirs of my sister S and nephew L," it was held, the testator having recognised I as being alive, that the word "heirs" was used as a description of legatees only, and not in its appropriate technical sense, as denoting the succession, and that the individuals of the several classes of children, were entitled equally *per capita*.

The case of *Stow* v *Ward* (3 *Hawks* 604,) approved, and the case between the same parties (1 *Dev. Rep.* 57) reversing it, overruled.

Nathan Ford, by his will, devised and bequeathed as follows :

"I give and bequeath to my brother, *John Ford*, two "hundred acres of land, including where the said *John* "now lives, during his natural life, and at his death, "the said land to fall to his, the said *John Ford's* children.

"I give and bequeath to my nephew, *Levi Ward*, my "sorrel horse called *Merlin*, and my negro boy, named "*Dick*, to him and his heirs forever.

"It is my will, and I do allow that all the remaining "part of my estate, both real and personal, be equally "divided amongst the heirs of my brother, *John Ford*, the "heirs of my sister, *Nancy Stow*, the heirs of my sister, "*Sally Ward*, and my nephew, *Levi Ward*."

At the death of the testator, his brother *John* and his sister *Nancy* were living—the former having four, and the latter nine children. *Sally Ward* was dead at the date of the will, having left two children, both of whom survived the testator, and of whom *Levi Ward*, the plaintiff and legatee, was one.

A petition for the partition of the land of which the testator died seised, was filed in Lincoln, and a final judgment was entered thereon, whereby one fourth thereof was assigned to each of the families, to be divided among them, excluding *Levi Ward* from any share of the fourth assigned to the family of his mother, and giving him the remaining fourth. Upon an appeal to the Supreme Court, this judgment was reversed, and a divi-

sion *per capita* directed (3 *Hawks* 604.) Instead of remanding the cause and awarding a *procedendo* to the court below, a writ of partition was issued from this court, and upon its return, the order reversing the judgment below was set aside and another writ of partition issued, directing the division to be *per stirpes*, including *Levi Ward* and giving him in addition thereto one clear fourth. (1 *Dev. Rep.* 67.) And on the return of this writ, judgment of confirmation was entered. After the first division above mentioned, the legatees supposing it conclusively to settle their rights under the will, made a voluntary division of the negroes and other personal property, according to the principle which was thereby established. When the last division was set aside and one *per stirpes* directed, the plaintiff filed this bill, in which he averred that the voluntary division of the personal property was made under a mistake, and prayed to have it set aside and another division made according to the last adjudication.

The case was frequently argued and held under advisement for several terms.

Winston for the plaintiff.

Badger and *Devereux* for the defendants.

GASTON, Judge.—The enquiries which this case presents are exceedingly unpleasant, but so far as the purposes of justice require, they must be prosecuted to their legitimate result. The first of these enquiries is, whether the division complained of and sought to be reformed, be erroneous or correct. On the part of the complainant, it is insisted that the last adjudication of the court must be regarded as conclusively settling the construction of the will with respect to the real estate, and by necessary inference, fixing its construction also as to the personal property. It is also insisted, that if the interpretation of the will can be considered as *open* to discussion, the reasons on which that adjudication is founded, completely sustain it. Upon this point, the argument is briefly this: that where persons come to an estate as *heirs*, whether by descent or by purchase, under

JUNE, 1834.

WARD v. STOW.

that description, they take *per stirpes* and not *per capita*, in a *representative* character and not as *individuals*, and to others must be always considered as an unit, however they may subdivide and parcel out the property among themselves. That if A dies intestate, seized of lands of inheritance, leaving a daughter and two daughters of a deceased daughter, his lands descend one half to his daughter and the other half to his grand daughters, and that if a devise should be made to them, simply as the heirs of A, they must take the estate in the same proportions; that in the first case, the canons of descent ascertain the heirs, and direct the disposition of the land, and that in the latter case, the will gives to those whom the canons ascertain to be the heirs, and in such proportions as the canons direct. It is thus concluded from the force of the word *heirs*, that the persons indicated in the will as the heirs of *John*, *Nancy* and *Sally* are to be regarded as the representatives of, and substitutes for, *John*, *Nancy* and *Sally*, respectively, and taking the same shares as if the land had been given to *these* persons, and then transmitted to them as the successors of these ancestors; and that a similar result must take place with respect to the personal property, first, because it was obviously the intent of the testator, to give both species of property to the *same* persons in the *same* way, and secondly, because the word heirs as applied to personal property means heirs *quoad* that property, that is to say, those whom the statute of distributions directs to succeed to the personal estate of an intestate.

None can be more deeply convinced than we are, of the necessity of a steady adherence to the decisions of our predecessors. Carelessness in this respect can scarcely fail to involve us in error and throw the law into confusion. So far as the decisions of these eminent Judges concur with each other, they form a law for this court, which nothing short of what we may reasonably hope cannot happen, a manifest breach of the law of the land, can warrant us to disregard. Where they are found to conflict, which from the imperfection of all human institutions must sometimes be the case, the latest

will of course be presumed right, yet not so conclusively right as to forbid examination. In the present singular case however, it is somewhat difficult to say, which of the two opposing decisions has the better claims to be regarded as a precedent; for while the one is the more recent, the other has the advantage of having been unanimous; of having been decided upon argument, and of being a judgment in a case regularly and properly before the court. Convinced that we ought not to rely authoritatively and exclusively on the last adjudication, we have deemed it an imperious duty, deliberately to investigate the argument by which it is supposed to be established.

The whole of the reasoning is founded on the effect which the word *heirs* is supposed to produce in the devising and bequeathing clause. *An heir* is he who succeeds by descent to the inheritance of an ancestor, and in this, its appropriate sense, the word comprehends all heirs, and the heirs of heirs *ad infinitum*, as they are called by law to the inheritance. This succession is regulated by the canons of descent. According to one of these, the lineal descendants of any person deceased represent their ancestor, or stand in the place in which such ancestor would have stood if living at the time of the descent cast and it is this taking by a right of representation which is termed a succession *per stirpes* or by stocks, the branches taking the same share which their stock would have taken. From this definition, it would seem to follow, that in strictness none can come to an estate *as heirs* otherwise than by descent. Thus *Lord Thurlow* says in *Jones* v. *Morgan*, (1 *Brown* 209,) "all heirs taking *as heirs* must take by descent.' Upon this ground he holds the rule inflexible which requires that when a freehold is given to one and a remainder is so limited as to go in succession to the heirs of the first taker, these shall take by descent, because "taking in the *character* of heirs, they must take with the quality of heirs"—that is to say, must take by descent and not by purchase. But an inheritance may be limited in remainder to the heirs of him to whom a precedent freehold is not given, or it may be originally limited to the heirs of a deceased person. Here the do-

JUNE, 1834.

WARD v. STOW.

nees do not take by descent, for their ancestor has no estate which the word "heirs" can expand into an estate of inheritance. They do not therefore take as heirs but take simply as *purchasers*. But it is insisted for the plaintiff that nevertheless they are *described* as "heirs;" that the law of descents is necessarily referred to for the understanding of that term, and the ascertainment of the persons thereby intended; and therefore this law is to regulate also the shares in which the thing given is to be enjoyed by those on whom it is bestowed. With the highest respect for those who have drawn this inference, we are compelled to say that we do not feel its force. Every voluntary disposition of property takes effect according to the agreement of the contracting parties. Their intentions, properly expressed, give the mode and the form that constitute the *law* of the conveyance. The regulations of the State for the transmission of inheritances left vacant by death do not, *proprio vigore* operate on the subject matter of such conveyances, and can apply to them only so far as the parties have adopted them and directed them to be so applied. When a technical phrase is deliberately used, it is reasonable to suppose that it is employed in the sense appropriated to it in the science or art from which it has been taken, and that science or art is very properly consulted for its interpretation. "Heirs" is a well known term in the law of descents, and when donees or devises are not otherwise described than as heirs, the law is impliedly referred to for the meaning of the term. But whether these donees or devisees are to take much or little, for a long or a short time, all together or by moieties in equal or unequal portions, the law of descents can give no information; for it has made no provision in relation to these matters but has left all these to be regulated by the law which the parties may have themselves made in their conveyance. Is it then a reasonable inference that the conveyance refers to the law of descents *for any such purposes?* If there be indeed a settled rule of construction to this effect, it will most cheerfully be followed, but after diligent inquiry, I have been unable to find any traces of

its existence. There are indeed some anomalous cases, in which the words "heirs male of the body," and the like, although operating to a *certain* extent as words of pure description or purchase, have also been allowed to operate as if they were words of limitation and according to the canons of descent. Thus it has been said that where a limitation is made to *the heirs male of the body* of B, where no estate is in, or is given to B himself, though the limitation originally attaches in his heir male under that special description, yet on failure of his issue male, it will go in succession to the other heirs male of the body of B, as if the estate had descended from B himself. Here the word heirs has a double meaning and a mixed effect. The individuals who first take under this term, take as purchasers, designated by the relation which they bear to a deceased ancestor; but they take an estate which, *by the form of the donation*, is to pursue the same course of succession to the same extent of duration, and through the same persons as if it had attached to and descended from such ancestor. Such a limitation is of an intermediate description betwixt a descent and a purchase, in point of acquisition having the quality of the latter, as not being derived from or through the ancestor, but in regard to its devolution referable to the former. This and such like cases are considered as *quasi* entails in regard to which the law is setttled, but the principles on which it is settled are not easily discoverable. (See *Butler's Ed. of Fearne*, 80 to 84.) How far the position may be true, that persons called to *such an estate as heirs*, take in a representative character with the shares or the portions which the canons of descent point out, may be a very curious subject of enquiry; but it can throw little light upon the investigation in which we are now engaged. The term "heirs" has here but a single meaning and can produce as we think but a single effect. It is not pretended nor assumed to be a word of limitation. It directs nothing as to the devolution or succession of the estate after it is vested in the original devisees or first takers, and its sole purpose seems to be to point them out. An estate not of inherit-

JUNE, 1834.

WARD v. STOW.

ance, an estate for life, or a term of years, or a chattel, may be limited to persons not otherwise described than as the heirs, or the heirs of the body of a deceased person: and so an intestate of inheritance may be limited to persons thus designated, without any attempt to direct its transmission, as in a course of descent from that ancestor. In the first class of cases, the word heirs is *necessarily*, and in the last case is *obviously* one simply of description, whereby the donor or testator declares under a general term, instead of mentioning by their names the persons whom he contemplates as donees or devisees of his property. It is a collective term so far only as is every term which may comprehend within it more individuals than one, but it is not collective as calling in the whole *succession* of heirs to the deceased person. Whenever a descriptive phrase is used in any conveyance instead of an actual nomination, the import of the phrase must be attended to in order to find out the persons meant by it. If it be seen that by the term "heirs" those are intended who, at the time referred to, were or might be the "*heirs*" at law of a deceased ancestor, of course the law must be consulted to enable the enquirer to determine who answer to this description, and who therefore are these first takers. (*Foster* v. *Sierra*, 4 *Ves.* 768.) But this determined, the sole purpose of the reference is over; and the persons thus ascertained take simply and purely *by virtue of the conveyance* in their own persons, not as the representatives of others, precisely as though they had been individually named, or had been described by any other phrase sufficiently explicit to point them out. Thus in the case of *Mounsey* v. *Blamire*, (4 *Russell*, 384,) the testatrix by her will *inter alia*, devised her real estate to a person whom she described as her kinsman, and who was not her heir at law, and directed him to assume her name and arms. By a codicil she gave several pecuniary legacies, and amongst others "to my heir," £4000. At her death this legacy was claimed by three persons: who were her co-heirs, by her next of kin, and by the devisee of her real estate as the *hœres factus*. The claim of the devisee was at

once rejected by the master of the Rolls. In deciding between the next of kin and the co-heirs, he remarked, that where the word heir is used to denote succession, it may be understood to mean such person or persons as would legally succeed to the property according to its nature and quality; but where it is used not to denote succession but to describe a legatee, and there is no context to explain it otherwise, it must be taken in its ordinary sense. The co-heirs therefore took the property, and there being no words of severance in the will, they took it as joint tenants. So if a man makes a gift of gavelkind lands to J. S. and the heirs of his body, and he hath four sons, all these sons shall inherit; but if he make a lease for life to one, remainder to the right heirs of J. S. and J. S. dies, leaving issue four sons, in this case, the eldest only shall have the remainder. (*Shelby's case*, 1 *Co.* 103, *Co. Lit.* 10, *Hob.* 31. *Dyer* 179 *pl.* 45.) In the first instance, the word heirs of his body, are words of limitation, and call in all who by law can succeed to an estate tail in those lands; but in the last the words right heirs of J. S. are words of purchase, are *descriptive* merely, and refer to the law no further than is necessary to explain the description. If the donor, however, had added to these words "in gavelkind—or according to custom," or such like, then all the four sons would have taken, because all would have been included in the description. (*Hargrave's Note to Co. Lit.* 10. *Newcomen* v. *Barker*, 2 *Ves.* 732.) So if one seized of lands in Borough English, devise to his "heir," the eldest son and not the youngest, would take; but if he devise to his heir in Borough English, the lands will descend to such youngest son. (14 *Viner's Ab.* 528, 529. *Heir C.* 5 *pl.* 1, 8.) I am forced to conclude, therefore, that when the term "heirs" is altogether a word of purchase and simply descriptive of the first takers—where it is not used to denote *succession*, but to designate *persons*, those who come under that description take as individuals, and not in a representative character, and of course take *per capita*, unless there be an intent to the contrary apparent on, or to be collected

June, 1834.

Ward v. Stow.

from, the instrument itself. But it is manifest in this case, not only that the word "heirs" does not denote *succession*, but that it is not used to designate those whom the law calls "heirs at law." The testator makes a devise of land to his brother *John*, and thereby recognises that *John* was alive at the date of the will. By the phrase "heirs of his brother *John*," he must then contemplate persons other than those who are in law his heirs, and to give effect to this disposition, we are obliged to understand the word heirs in some sense different from its ordinary and legal meaning. It may mean heirs apparent or heirs presumptive. But in the same sentence we meet with the expression "heirs of my sister *Sally, deceased;*" and here it may mean heirs at law, but cannot mean heirs presumptive or heirs apparent. We find the same term used in the same sentence to designate persons standing in a certain relation to living persons, and also to dead persons. It cannot be interpreted in what is called its technical sense to mean those who *have succeeded* by law to the inheritance of their ancestor, because so interpreted it would exclude the heirs of his brother *John* and sister *Nancy*.—*Nemo est hæres viventis.* It cannot be interpreted in the sense sanctioned by custom, of heirs apparent or heirs presumptive; that is to say, of those who *will probably* inherit from a *living ancestor*, for then it would not embrace the heirs of his sister *Sally*. Besides, the term is used in reference to the gift of personal as well as of real property. Heirs, heirs apparent, heirs presumptive, ordinarily indicate those who have or expect a claim on the *lands* of another, by reason of their connection with him; but those who acquire personal property on the death of its possessor, or look forward to its acquisition upon his death, are generally termed his relations or his next of kin. The word is used in some sense sufficiently comprehensive to take in all the objects of his bounty, and employed in relation to *both* species of property. Individually, I am quite satisfied that the testator means by it "children," and I think we have this exposition given by himself in the preceding sen-

tence, where he directs the land devised to his brother *John* for life to go upon his death "to his brother *John's* children." But the court does not decide this to be its meaning. We decide only that it does not mean *heirs* properly speaking, nor *heirs* apparent, nor *heirs* presumptive. It is unnecessary to determine whether it means children or issue, for upon either interpretation, the same result will follow. There is no reference expressly or impliedly to the canons of descent or to the statute of distributions; not even for the purpose of ascertaining the first takers of the property, and still less for fixing the proportions in which they shall take it.—An improper term has been used by the testator, and in order to effectuate his intention, we are bound to give the will the same construction as though he had used the appropriate expression. If by "heirs" he meant children or issue, we are to read the will as if it were written children or issue. It may not be amiss to quote a strong case in illustration of this doctrine, although it seems reasonable enough to stand without authority.—In *Doe on dem. Hallen* v. *Ironmonger*, (3 *East.* 533) lands were devised to a trustee to receive and pay the rents for the maintenance of *Sarah Hallen*, a *feme covert*, and the issue of her body, during her life, and after her decease, for the use of the heirs of her body, and their heirs and assigns forever, without regard to seniority of age or priority of birth, and in default of such, to the right heirs of the testatrix. *Sarah Hallen* enjoyed the premises during life, and had issue one son and two daughters. The son died before the mother, leaving the lessor of the plaintiff his son and heir at law, and also four other children. On her death, this ejectment was brought against her surviving daughters, and the question was, whether the plaintiff was entitled to recover any, and if any, what part of the premises. It was admitted that no estate of inheritance passed to *Sarah Hallen*, for that the legal estate during her life was in the trustees, but it was insisted first, that a legal contingent remainder was limited to such person or persons as should be the heir or heirs of her body, at the time of her death, under

JUNE, 1834.

WARD v. BROW.

which description the eldest son was entitled to the whole; and secondly, if the court thought that heirs of the body meant children, then such children would take as tenants in common, and the lessor of the plaintiff was entitled to a third. It was urged upon the last point, that the qualifying expressions "without regard to seniority of age, or priority of birth," meant only that all the children should take equal portions; those who came in *esse* last as well as first; that the word "heirs" was sufficient to *sever the estate*; and that it was plain that all were meant to take alike, which could not be without taking as tenants in common. But the court stopping the counsel for the defendants, held that the phrase, "without respect to seniority of age, or priority of birth," annexed to the words heirs of the body, conclusively indicated that these were words of purchase, and *meant* children; and secondly, that as there were no words of severance used, they took as joint tenants, and the father of the lessor of the plaintiff having died before severance, the whole vested in the surviving children, the defendants.

We are brought then irresistibly to the conclusion that the word "heirs" as used in this will, has not the peculiar operation which has been attributed to it, and that the persons whom the testator designated by this expression must take the shares, whatever they may be, which the will assigns to them, in the same manner as if they had been pointed out by any other and more appropriate terms. The will declares that the property given to these persons *shall be equally divided*, and the only question that remains is, between whom is this equality directed. Is it between the *classes*, or is it between the *individuals* of which the classes are composed? Adopting the language of Chief Justice TAYLOR upon the first adjudication, (3 *Hawks* 606,) we think that there "there has been a settled construction upon all devises and bequests of this description, recorded in a series of decisions to be traced back for more than a century," which leaves us no liberty to speculate on this question. It can scarcely be necessary to swell the list of authorities to which he has appealed, and which clearly sustain his po-

sition. We will add only the following cases to the very strong ones which he has enumerated. In *Davenport* v. *Hanbury*, (3 *Vesey*, 257,) a legacy was given to A or her issue. A died before the testator, leaving a son and *two* grandchildren, the children of a deceased daughter. It was held that the word issue included grand children and that the son and grand children all took as joint tenants, but that had the word "equally" or the words "equally to be divided," been inserted, they would all have been taken *per capita*. "As there are no words of severance, nor any thing to show that they were intended to take, not in their own rights but as representing others, the son and the children of the deceased daughter must be considered as *personæ dignatæ*, and will take as joint tenants." In *Barnes* v. *Patch* (8 *Ves.* 604,) there was a devise of real and personal estate to be equally divided "between my brother *Lancelot's* and sister *Esther's* families;" it was held that the children of *Lancelot* and *Esther* took exclusively of their parents, and all took equally *per capita*. In *Lincoln* v. *Pelham*, 10 *Ves.* 166,) the testatrix bequeathed one-fourth of her personal estate to the younger children of a daughter A, a fourth to the younger children of a daughter B, a fourth to the child or children of a daughter C, (upon and after the death of said C,) and the remaining fourth to the child or children of a daughter D, upon and after her death; and directed that if either of the last mentioned daughters should have no child living at her death, the part allotted to *her* child or children should go to the child or children of the *other*, and if both of them should die and leave no child as aforesaid, then these two fourths should be equally divided amongst the younger children of her daughter A, and the younger children of her daughter B. The daughters C and D both died unmarried, and it was held that these two last mentioned fourths were to be distributed among the younger children of A and B *per capita*.

The result of our enquiries is a full conviction that the last adjudication of the court upon this will was wrong, and that the first was right; and as there is no doubt

JUNE, 1834.

GILES v. FRANKS.

but that the personal and real estate are given to the same persons and in the same shares, the error which the plaintiff complains of in the division of the personalty and which it is the purpose of this bill to reform and correct, does not exist. We are therefore, all of opinion, that the plaintiff's bill must be dismissed, but for obvious reasons, it is to be dismissed without costs.

PER CURIAM—ORDER ACCORDINGLY.

EDWARD S. GILES *v.* ELIJAH FRANKS, *Ex.*

A legacy to A *when* he shall attain twenty-one, does not vest before that time, and a payment to his guardian during his infancy, does not protect the executor

This was a petition originally filed in the County Court of Onslow, to recover a legacy left by *Edward Franks*, the testator of the defendant, to the plaintiff.—The will at length was not certified with the record, but was as stated in the petition, and admitted in the answer to be as follows:

"I give to *Edward S. Giles* one horse, saddle and bri-"dle, worth 80 dollars, when he shall arrive at the age "of twenty-one."

It was admitted that the defendant had paid the legacy to the father of the plaintiff, who had been *duly* constituted his guardian, and that this delivery was made before he arrived at his full age. The only question was whether this delivery protected the defendant, the father having become insolvent, but the surety to the guardian bond being still able to pay the amount.

His Honor Judge DONNELL, on the last circuit, dismissed the petition, thinking the plaintiff had his remedy against the surety to the guardian bond, and the latter appealed.

J. H. Bryan for the plaintiff.

No counsel appeared for the defendant.

RUFFIN, Chief-Justice.—There is no dispute in this case upon the facts, the parties having agreed on them in the pleadings, or by admissions in court, as set forth in the decree of the Superior Court. The bequest is in these words: "I give to *Edward S. Giles*, one horse, saddle and bridle, worth $80, when he shall arrive at the age of twenty-one years." The will is not exhibited, and no other parts of it set forth in the record, so that the case turns upon the words of this disposition alone. Upon them it is within the rule which annexes the time to the substance of the legacy, and makes the right dependant upon the arrival of the legatee to the age prescribed.—Although this rule was adopted by the Courts of Equity less upon principle, than from the necessity to make their decisions, in a matter in which the two tribunals exercised a concurrent jurisdiction, conform to the prior ones of the Ecclesiastical Courts, yet it is now an old rule of equity itself, which must be adhered to. It is found in all the text writers, and is acknowledged and acted on by the courts in modern time. (1 *Eq. Ca. Ab.* 295, *p.* 6. *Hanson* v. *Graham*, 6 *ib.* 239.) It has also been adopted in this State in *Perry* v. *Rhodes*, (2 *Murph.* 140) and in other cases. The *gift* is *when* the legatee shall attain twenty-one. Until that event the legacy is contingent, and could not be demanded. The utmost relief that could have been granted in the respect of it, would be to secure it; and upon the death of the legatee before its vesting, it would have lapsed.

The question is whether in the event which has happened, namely that the legatee has attained his age, a prior payment during his minority, to his guardian, be a due payment, so as to discharge the executor.

An executor is a trustee for the legatees, and is bound to preserve the legacies for them, so that they shall have the benefit intended for them at the periods designated. If he or any other trustee, with even the best intentions, place the fund in other hands, without the directions of a competent court, or other legal authority, he does it at his peril, and must answer it to the person entitled.—There are many cases in the books, where the executor has

JUNE, 1834.

GILES v. FRANKS.

been charged a second time under circumstances of great hardship. It is upon the principle that he cannot, for his own ease, make another person the debtor or trustee for the legatee, when he was not compelled or compellable to it. Such is the case here. The payment was made to the guardian, who had not then, and never could have authority to receive it. His office would necessarily expire before the legacy could arise, which could only be when the legatee would have capacity to receive it himself, and give an acquittance for it. That the payment to the guardian, under these circumstances, is not conclusive on the legatee, seems to follow from this, that it is not a payment to the legatee either in fact or in law, on which he would be chargeable to all purposes with the sum, as having been received by him. Suppose the petitioner had died after the payment, and before twenty-one—the legacy as having lapsed, would be redemandable by the executor or a remainder-man, if limited over. From whom could it be required? Certainly not from the administrator of this legatee; because he had never a right to receive it, nor ever in fact received it. The resort must have been to the guardian by whose hands it was received and is held, and to those who have bound themselves for him, if there be such. If the general estate of the legatee would not be liable to refund it, the consequence seems a necessary one, that until the value came in fact to his hands, his legacy is not satisfied. This seems to have been in effect admitted by his Honor, as the decree rests principally upon the ability of the petitioner to obtain satisfaction from the sureties of his guardian. If that could operate at all against the petitioner, it would only be as a temporary restraint, until he had made the effort, and tested its success; which could not authorise a decree dismissing the petition, and thereby establishing it now, as a perpetual and conclusive bar. But it seems to us that it does not affect the petitioner more in the one way than in the other.

It is very true that the petitioner would have a remedy against the guardian personally, upon his actual receipt of the money, and so with the defendant, upon

his having to pay it a second time. But it is admitted that the guardian died insolvent, so that the right of recourse to him is a vain one. It is however stated that his sureties are of ability and responsible. It is a question whether they would be liable, since the money, at no time during the guardian's life, was the property of the ward. But admitting that a recovery could be made from them, because their principal received the sum under color of his office, and converted it, yet the defendant is also the trustee of the petitioner, and committed a breach of trust in paying over a legacy which he ought to have held in his own hands. A *cestui que trust* may follow the fund; but he is not bound to do so. He may, if he choose, take his recourse immediately against his trustee, and leave the latter to re-imburse himself out of the fund, or from the party in whose hands he placed it, or those who are answerable for him. The responsibility of a trustee is not subsidiary but primary, and the person entitled is not obliged to look further than to him. If the guardian or his sureties (supposing them bound) were before the Court, it would be just that the decree should, in the first instance call the money from those who will be ultimately liable for it; but the plaintiff is under no necessity to make them parties, as he has a distinct and complete case against the defendant may at his election take his relief against him exclusively. For these reasons, the Court deems the decree erroneous, and reverses it, and thinks the plaintiff entitled to a decree for the value of his legacy, with interest from the filing of this petition, with costs.

PER CURIAM.—DECREE REVERSED.

June, 1834.

PROBATE COLLIER,

v.

THE BANK OF NEWBERN, JAMES RHODES, AND CHARLES HOPTON.

Defendants need not answer immaterial allegations. Therefore, where a plaintiff alledged that an execution in favor of the defendants, being in the hands of the Sheriff, he had in satisfaction thereof discounted with the Sheriff a judgment which he, the plaintiff, had against him and others, an execution for which was then in the hands of the Coroner, and that mutual receipts had passed between him and Sheriff; and further, that the Sheriff not paying over the money to the defendants, they had obtained a judgment therefor upon the official bond of the Sheriff; it was held, that without the assent of the defendants to the settlement between the plaintiff and Sheriff, these facts constitute no defence against the judgment in favor of the defendants, against the plaintiff; and that the defendants need not answer whether the Sheriff and others against whom he had the judgment, were good and able to pay the same, nor whether an execution on said judgment was in the hands of the Coroner, nor whether the plaintiff gave the Sheriff a receipt for the judgment, nor whether the Sheriff and his sureties were able to pay the judgment obtained on his official bond.

The plaintiff alledged, that being indebted to the defendants, the President and Directors of the Bank of Newbern, a suit was instituted and judgment obtained against him at February term of the County Court of Wayne, 1828, for the sum of $1040 88 cents; that an execution issued thereon, and came to the hands of *Calvin R. Blackman*, then Sheriff of Wayne county, who received satisfaction therefor from him, the plaintiff, and gave him an acknowledgement for the sum of $1055 13 cents, which was in full thereof, except the costs; that the whole amount of the execution was not paid in money, but a part thereof was satisfied in the following manner: One *John Sneed* had, before that time, obtained a judgment against *Blackman*, *Stephen Smith* and others, for the sum of $1627 70 cents; that the plaintiff received an assignment of part of said judgment, an execution on which was then in the hands of the coroner of the county of Wayne. That when the execution against the plaintiff in favor of the Bank of Newbern came to the hands of *Blackman*, the plaintiff, believing the judgment

against *Blackman*, *Smith* and others to be perfectly good, and that he might legally discount with *Blackman* the amount of his part of *Snead's* judgment, in satisfaction of the execution in favor of the Bank of Newbern, did in good faith make that arrangement with *Blackman*, and after paying the balance of the execution in money, received from him the receipt above mentioned, and then gave a receipt on the execution against *Blackman* for the amount thus discounted.

The plaintiff alleged further, that some time after this settlement was made, the defendant, the Bank of Newbern, instituted a suit by *scire facias* to revive the judgment against him, the plaintiff. And at the Spring Term, 1833, of the Superior Court, obtained a judgment for the sum of $915 4 cents, it being the balance due after, allowing certain payments made on account thereof, by *Blackman*; that whilst the suit by *scire facias* was pending, the President and Directors commenced suit on the official bond of *Blackman* against him and his sureties, the defendants *Rhodes* and *Hopton*, and obtained a judgment against them for the debt due said President and Directors from the plaintiff. But the plaintiff alleged that the President and Directors of said Bank colluding with the other defendants, *Rhodes* and *Hopton*, forbore to collect the money from them, they being perfectly able and sufficient to pay the same, but was pressing the plaintiff therefor.

The prayer of the bill was for an injunction to restrain the defendants, the President and Directors of the Bank of Newbern, from enforcing the collection of the judgment on the *scrie facias* against the plaintiff, until they had first endeavored to obtain satisfaction from *Blackman* and the other defendants, on the judgments against them; or that upon receiving satisfaction from the plaintiff, they might be compelled to assign to him the last mentioned judgment.

The defendants, the President and Directors of the Bank of Newbern, admitted that the plaintiff was indebted to them, and that they had instituted suit and obtained judgment for the amount due as stated. They also

JUNE, 1834.

COLLIER v. BANK OF NEWBERN.

admitted the assignment by *Snead* to the plaintiff, of a part of a judgment which he had previously obtained against *Blackman*, *Smith* and others. They admitted further, that they had understood and believed it to be true, that the plaintiff had made some arrangement with *Blackman*, by which *Blackman* was to take upon himself the payment to the defendants of their judgment against the plaintiff, and that *Blackman* executed a receipt to the plaintiff for the amount of their judgment, as if it had been paid to him as Sheriff. But they did not admit that the plaintiff in making this arrangement with *Blackman*, acted fairly and in good faith, under the belief that he had a right so to do, on the contrary they stated it as their belief, that it was a cunning and dishonest contrivance between the plaintiff and *Blackman*, to relieve the latter from the pressure of *Snead's* execution: and also to pay the debt of the plaintiff to the defendants, by throwing it upon *Blackman* and his sureties. The defendants further stated that they did not know whether the plaintiff did or did not give any receipt, on account of *Snead's* judgment, in return for the receipt given by *Blackman* for the judgment against the plaintiff in favour of the defendants; but if such were the case, they submitted that this interchange of receipts could affect them, they not being cognizant of, nor assenting to it. The defendants further admitted, that they had instituted a suit by *scire facias* to revive the judgment against the plaintiff, and had obtained a judgment in the Superior Court, on the trial of which suit it had been shown, that at the time when *Blackman* executed the receipt to the plaintiff, he had not in his hands any writ of execution authorising him to collect the money. They also admitted that pending that suit they had obtained a judgment against *Blackman* and the defendants, *Rhodes* and *Hopton*, his sureties on his official bond, for the amount of the same judgment. They denied all collusion with the other defendants, or that any agreement, expressed or implied, existed between them, further than that they had directed their attorney to collect the money from the plaintiff before resorting to the other defendants. They stated that this

was done under a conscientious belief on their part, that *Rhodes* and *Hopton* ought not to be pressed, if the money could be got out of the plaintiff—that in point of interest it was immaterial to them from whom the money was received; and they submitted upon the receipt of the amount due them, to assign either of their judgments as the Court might direct.

The answer of the other defendants, *Rhodes* and *Hopton*, corresponded in all material respects with that of the President and Directors of the Bank of Newbern, only they stated further, that at the time when the judgment was obtained on the official bond of *Blackman*, they were ignorant of the fact that when *Blackman* gave the receipt to the plaintiff, he had no execution in his hands authorising him to receive the amount of the judgment in favor of the other defendants against the plaintiff.

To these answers the plaintiff excepted: 1st, because the defendants had not answered and set forth, whether *Blackman*, *Smith* and others, against whom *Snead* had obtained judgment, and which judgment was in part assigned to the plaintiff, were perfectly solvent and good and able to pay that judgment.

2dly. Because they had not answered and set forth whether *Rhodes* and *Hopton*, the sureties of *Blackman*, against whom the President and Directors of the Bank of Newbern had obtained judgment, were perfectly solvent and able to pay the judgment so recovered against them.

3dly. Because they had not answered and set forth, whether an execution was in the hands of the Coroner of Wayne county, against *Blackman*, *Smith* and others on the judgment obtained by *Snead*, and which had been assigned to the plaintiff.

4thly. Because they have not answered and set forth, whether the plaintiff gave his receipt on the execution against *Blackman*, *Smith* and others, issued on the judgment in favor of *Snead*, and which was assigned to the plaintiff as before mentioned.

JUNE, 1834.

COLLIER v. BANK OF NEWBERN.

His Honor, Judge DONNELL, at Wayne, on the last Spring Circuit, *pro forma* allowed the exceptions, and the defendants appealed.

Mordecai, for the plaintiff.

J. H. Bryan, *contra*.

DANIEL, Judge.—The first exception to the sufficiency of the defendant's answers, must be overruled; because, whether *Blackman*, *Smith* and others, were good and able to pay the judgment which *Snead* had obtained them, (a part of which belonged to the plaintiff,) was a matter quite immaterial in this case; as it is not alleged by the plaintiff in his bill, that the Bank assented to any arrangement by which its judgment against the plaintiff, should be satisfied out of any portion of *Snead's* judgment against those persons; and the Sheriff had no execution in his hands at the suit of the Bank against the plaintiff.

The second exception must be overruled; because although *Blackman*, *Rhodes* and *Hopton* may be able to pay the judgment which the Bank obtained against them, still as no payment or satisfaction has actually been made on this judgement, the circumstance of the judgment having been obtained by the Bank against the Sheriff and his sureties, is not, in law or equity, a satisfaction or discharge of the judgment which the Bank had before obtained against the plaintiff, although the two judgments were in fact for one and the same demand. The Bank had its election to make the money either out of them or the plaintiff; and the election the Bank proposes to make is obviously the just and equitable one, because the Sheriff's sureties were not properly chargeable.

The third exception must be overruled; for if the fact was that the coroner had an execution in his hands at the instance of *Snead* against *Blackman*, *Smith* and others, and if at that time the plaintiff thought proper to give *Blackman* a receipt for his, the plaintiff's, part of *Snead's* judgment, under an agreement with *Blackman* that he would pay the Bank that sum, on its execution

against the plaintiff, if it had been then in his hands as sheriff; still as no cash was paid, such an arrangement made by the plaintiff and the sheriff, without the assent of the Bank, could in no wise operate as a discharge of the plaintiff from his liability to the Bank. The agreement of the sheriff could not bind the Bank. Nothing but the receipt of the cash, or a levy by the sheriff, and taking property sufficient to discharge the execution out of the possession of the present plaintiff could discharge his liability.

Nothing but cash received by the Sheriff from the defendant in an execution, or a levy upon his property, and taking it out of his possession, can discharge the debt due the plaintiff.

The fourth exception must be overruled; because the bill does not pretend to state that the Bank assented to the transaction. Therefore, whether the plaintiff gave his receipt to *Blackman*, for his part of *Snead's* judgment against *Blackman*, *Smith* and others, was a thing quite immaterial to the Bank. It was neither payment or satisfaction of the execution which the Bank then had against the plaintiff. But the defendants in their answer do state, that they do not know whether the plaintiff gave *Blackman* any receipt for his part of *Snead's* judgment. Their omitting to say whether they were informed or believed that the plaintiff had given such a receipt, in this case, would have been useless, for the reasons before mentioned. The answers state that it was proved on the trial, that *Blackman* did not have the execution for the Bank in his hands, at the time he and the plaintiff made the agreement. We think that the order made in the Superior Court, allowing the exceptions to the sufficiency of the answer must be reversed, and that all the exceptions must be overruled.

PER CURIAM.—DECREE BELOW REVERSED.

JUNE, 1834.

WILLIAM A. GREEN

v.

JONES COOK, *et al. Ex'rs. of* WILLIAM HARRISON.

Upon a bequest to children, as tenants in common, with a postponement of the division, in the absence of any direction to the contrary, the expenses of each is a separate charge upon his share of the profits.

William Green, the father of the plaintiff, by his will among other things, provided as follows:

"The balance of my estate, both real and personal, I "absolutely order that it shall be kept together on my "lands, under the directions of my executors that I "shall hereafter name, and also that it be equally divided "between my children, *Harriet*, *Bryan*, and *William A.* "*Green;* this estate to be divided between my three "children named, when my daughter *Harriet* arrives to "the age of twenty-one years or marries; the balance "of my estate to be given up to my sons at the age of "twenty-one years."

This will was not executed so as to pass the land of which the testator died seised.

The testator of the defendants was appointed guar- to the infant legatees, and kept their negroes together on their land, and made the expenses for their nurture and education, a joint charge upon the profits as a common fund.

This bill was filed by the plaintiff for an account of his estate in the hands of the the guardian, and upon the usual reference, the master charged the plaintiff with one third of the whole expenses. He excepted to this charge, and insisted that his undivided third of the profits should be charged with the expenses of his nurture and education only.

Other exceptions were taken; but the above presented the sole question in the cause.

W. H. Haywood for the exceptant.

Badger contra.

GASTON, Judge.—Several exceptions have been taken by the plaintiff to the report of the commissioner, but the court understands from the counsel on both sides, that it is not required to pass upon any but a part of the seventh exception, because if that be not sustained, the plaintiff cannot bring the defendant in debt; and if it be sustained, the parties will either settle all the other matters embodied in the exceptions, or take an account *de novo*. The defendant's testator had been the guardian of the three children of *William Green* deceased, and their whole property was derived from their father. By a will, not executed however with the formalities necessary in a devise of lands, the testator after making a provision for his wife, proceeded as follows: [His Honor here repeated the terms of the will as above set forth.] The guardian who had the care of all these infants, made the expenses of their support and education a joint charge upon this property as a common fund, and the master has followed the same principle in taking the account. The plaintiff in his seventh exception objects to this as erroneous, and insists that his undivided third part of this fund, ought to have been charged with the separate expenses of his support and education.

If we are at liberty to indulge in conjecture as to the intention of the testator, we should perhaps sanction the interpretation of the will which was adopted by the master. The infants were to be supported and schooled by the income of this property, and the property itself was afterwards to be divided between them. It is not an unreasonable supposition, that the father intended, if sickness, accident, or difference in their capacities for receiving such instructions as would qualify them for the business and duties of life, should render a larger expenditure necessary upon one than the others, that their portions, when entering on life, should be nevertheless equal. It is usual for parents who live to settle their children, to make such allotment, and it is natural to look for such provision in the will of him who is taken from them before such duty is performed. But we are not permitted to indulge in conjecture. If his intention

June, 1834.

Green v. Cook.

can be collected from the will, we are to follow it out; but if that gives no rule to guide us in this respect, we must follow the rules of law. Although the will could not be operative to pass lands, if it had attempted to devise them, it manifests a clear purpose that the personal shall accompany the real property. Had it been operative as to lands, the real estate, as it is not devised away from his children, would have descended, as it has descended to them, on his death, as tenants in common. There can be no question but that under the will, the personal property became vested in them in like manner; that the division only was postponed, and that on the death of one before a division, his interest would have been transmissible to his representatives. If each of the children take an undivided third part, both of the real and personal property, the profits of each share follow upon the share itself, as its fruits, unless some other disposition is made of them. And if no means were provided for the necessary support of the children, the [illegible] of each became applicable to the support of each. The will is utterly silent as to the profits of the property in which they respectively obtain these undivided shares, and as to the charges to be imposed on them.—No intent, therefore, to make the profits of the whole property, a joint fund for the support of all the tenants in common, is expressed. In strong terms the division of the property is prohibited, until the eldest, by marriage or arrival at the age of twenty-one, shall have occasion for the allotment of her part in severalty. If from this direction it could be *inferred*, as if the testator had so declared, that until this division, the profits should be joint, and the charges on them joint, then we should be justified in giving effect to his direction thus satisfactorily ascertained. But we cannot draw this inference. He might for many obvious reasons, besides this conjectured purpose, have wished a division to be postponed until absolutely necessary. He might, from the nature of the property, have deemed it more for the interest of each, that the whole property should be kept together, and worked together, believing that thus the

whole receipts would be greater, the entire expenditures less, and the nett income of each be thereby enlarged. We must follow then the general rules of law, by which the profits attend on the shares, and the charges attach to the profits. And we do this with the more confidence, as in all the cases we have met with where maintenance is decreed to children who take an undivided property by will, we find that the maintenance of each child is deducted out of the profits of his share.

The court feels itself bound to declare so much of the seventh exception, as objects to that part of the report which credits the guardian in account with the plaintiff with a third part of the expenses of the support and maintenance of the three wards, must be allowed, and that the guardian instead thereof, is to be credited with the separate expenses for the support and education of the plaintiff. The parties will proceed to settle the account on this principle, or have a new account at the option of either. And for this purpose, and in pursuance of the agreement of the parties, the court doth set aside all the residue of said report, without an expression of opinion on the matters therein embraced.

PER CURIAM.—EXCEPTION SUSTAINED.

June, 1834.

SAMUEL S. DOWNEY, AND ANN A. SMITH,
v.
JAMES W. SMITH, MAURICE SMITH, SAMUEL H. SMITH, *et al.*

A gift, unaccompanied with delivery, and by an instrument not sealed, is not valid; and where a testator bequeathed a slave to his widow for life, and afterwards to all his children, and while the slave was in the possession of the widow, some of the children relinquished, without consideration, and by a writing not under seal, their interest in the slave to one of their brothers, it was held that the instrument passed nothing.

An executor will not be charged interest on a small sum, too inconsiderable for distribution, which he *bona fide* keeps in hand for a general settlement. Nor will he be charged interest on a large sum received after the filing of a bill for an account, when he makes no opposition to the account, and retains the money to answer the decree. But if an order is made in the cause, authorising him to pay the money into court, and he neglects to do so, he will be charged with interest upon it from the time the order was made.

This bill was filed in the Court of Equity for Granville county, for an account and distribution of the estate of *Samuel Smith* the elder, which he had bequeathed to his widow during her life, and afterwards to be divided among all his children. *Samuel Smith*, the elder, died in the year 1800, leaving ten children, all of whom, or their representatives, were either parties, plaintiffs or defendants. The defendants *James W. Smith* and *Maurice Smith*, two of the sons of the testator, were his surviving executors. The widow died in 1828. Among the slaves bequeathed to the widow, was a woman named *Amey*. Soon after the death of their father and during the life of his widow, several of the children executed to their brother *Samuel* the younger, a writing, which recited that it was the intention of their father to give that slave to his son *Samuel*, and for the purpose of fulfilling that intention, they thereby "relinquish to said *Samuel* the younger, all their claim and title to said slave *Amey*." The writing was not under seal. The slave was then in the possession of the widow, and so remained until her death; and in the mean time had

four children. Upon the death of the widow, the defendant *Maurice*, as executor of his father, sold these negroes as part of his estate, and in his answer stated that he did so, because he was advised that the writing was not effectual; but he, and his co-executor, *James W. Smith*, averred that they did not mean to claim their shares of the proceeds of the sales of that family of negroes.

Upon the death of the widow, in 1828, the estate to be divided was of the value of nearly $ 8,000, and the executor immediately distributed the slaves of which the title was undisputed, to the value of $ 4,184 81; and at that time *Maurice* received from his co-executor, who resided in Tennessee, $290 89 which he had in his hands by the permission of his mother, of the principal money collected on debts due the testator. The residue of the monies collected on those debts bequeathed to the widow for life, had been used by her, and was to be accounted for by her administrator, with whom no settlement was made, nor could be made, in consequence of the death of the executor of the widow, and a litigation about the probate of his will. At the first term after the filing of this bill, which was in August 1831, the defendants *James W. Smith* and *Maurice Smith*, executors of *Samuel Smith* the elder, answered and submitted to an account. Soon afterwards, the defendant *Maurice* made a settlement with his mother's administrator, and received the sum of $1528 94 cents. The plaintiffs replied to the answer but took no testimony. Upon a reference to the master, accounts were taken upon the answers and interrogatories to the parties. In the report the slave *Amey* and her increase were estimated as part of the estate to be divided among all the children, and in the account the defendant *Maurice Smith*, was charged with interest on the sums of money which came into his hands from the time he received them, though it did not appear that he had used the money, or made any profit on it, up to that time. Upon the coming in of the report, an order was made that the defendants might pay into court such monies as they might admit to be due the estate, without prejudice to the rights of any of the parties.

June, 1834.

Downey v. Smith et al.

The defendant *Samuel H. Smith*, executor of *Samuel Smith* the younger, excepted to the report, because by it the proceeds of the sale of *Amey* and her children were stated to be a part of the estate to be divided among all the children of *Samuel Smith* the elder, and no notice taken of, nor any effect given (as to any of the parties,) to the agreement or relinquishment made to his testator.

The defendant, *Maurice Smith*, excepted to the charges of interest against him.

Devereux for the plaintiff.

Nash for *Maurice Smith*.

W. H. Haywood for *Samuel H. Smith*.

RUFFIN, Chief-Justice.—After stating the case proceeded:

The exception of the defendant *Samuel H. Smith*, executor of *Samuel Smith* the younger, which raises the question whether the gift of the negro woman *Amey* is valid or not, must be wholly overruled. The writing is not under seal, and the possession did not accompany it. The slave was then and for many years afterwards held by the widow, and could not be delivered. A gift is not effectual, unless it be made by deed or delivery. As to the voluntary confirmation of the release on their part, by the defendants *Maurice* and *James W.* they will doubtless act on it between themselves and their brothers family. But it is not the subject of judicial cognizance in the distribution of the estate by decree. The money is still, in law, the property of those to whom the testator gave it.

To the charges of interest in the account reported by the master, the defendant *Maurice* has put in an exception which we think must be allowed. It could not have been the expectation or wish of any of the parties, that the small sum of $290 89 cents should be distributed amongst ten legatees before a general settlement; and the executor might therefore very properly not offer it. As to the larger sum received from the mother's administrator, it stands upon a different ground. It came to the defendant's hands pending this suit for it, and it

was reasonable that the executor should keep it to answer the decree. He made no resistance to the account and has excepted to no part of the report but the charges of interest. He ought not to be charged interest on the money which he ought to have kept, and as far as appears did keep, until the rights of the parties could be ascertained. It does not appear upon what ground the charge of $11 96 cents, for interest on a debt of *William Smith*, is made by the master against *Maurice Smith*.—There is no evidence relative to it, and therefore the account must also be corrected in that respect.

After allowing the exception of the defendant *Maurice*, and reforming the report accordingly, the report and account must in all other respects stand confirmed.

There arises however upon the making of the decree, another question upon the subject of interest, which in our opinion, is against the executor *Maurice*. Upon the coming in of the report at September term, 1832, an order was made that the defendants might pay into court such money as they might admit to be due the estate, and without prejudice to the rights of any of the parties as to their shares. This defendant had then an opportunity of discharging himself from further responsibility, and upon the paying in of the money, the court might have ordered at least a partial distribution. He has not availed himself of the leave granted to him, and we must presume that he has retained the money, either for his own use, or *male fide*, for the purpose of depriving the owners of the use of it, and in either case it is just that he should pay interest since that time. The decree will accordingly be that the shares of each shall carry interest from September 1832, until paid. The costs had nearly all accrued before that order; and as no default in the executor prior to that time appears, it is proper that the fund should answer the costs; and therefore they must be paid equally by all the parties out of their shares.

PER CURIAM.—Overrule the exception of the defendant *Samuel H. Smith*, and sustain that of the defendant *Maurice Smith*, and decree according to the report of

JUNE, 1834.

SANDERLIN v. THOMPSON.

the master thus corrected, allowing interest on each of the shares from September term, 1832, of the Superior court for Granville, till paid; all the costs of plaintiffs and defendants to be paid equally by the parties interested in the estate.

JESSE SANDERLIN *et ux.* v. DANIEL THOMPSON *et al.*

Where a testator directed his land to be sold and the proceeds divided among his children, the power being apparently executed, and the purchase money paid to the children, they will not be permitted to recover in ejectment, because the will was not proved so as to pass the land.

But if the purchaser, after filing this bill for relief, procures the will to be proved, and charges this fact by a supplemental bill she thereby overrules his original equity; because having established a legal title in himself, he defeats the jurisdiction of the court.

The bill, which was filed in the Court of Equity for Onslow county in 1827, charged that *John Thompson*, the first husband of the *feme* plaintiff, died in the year 1800, having by his will, which was admitted to probate upon the oath of *Nathan Askew*, the only subscribing witness thereto, devised and bequeathed as follows:—"*Item*, I lend to my wife *Sarah Thompson* all the pro-"perty that I possess, during her life or widowhood; "and if she should marry, the property shall be sold "and divided betwixt my children and the child that "she is big with now, and herself, &c." and appointed his widow and *William Pollock* executors, who duly proved the will—that the widow remained in possession of the land whereon the devisor lived at the time of his death, that being the only land he then owned.—That in 1805 she intermarried with the plaintiff *Jesse*, whereby the latter, in right of his wife, became sole executor of the will, *Pollock* having died before the marriage—that the plaintiff, being desirous of faithfully discharging the trust devolved upon him, under the advice of learned counsel, and under an order of the County Court, sold, on the 3d day of December, 1805, at public auction, the property which remained in the widow's possession, including the tract of land—that the sale had

been duly advertised for more than forty days, and when the land was set up, several persons bid for it, until it was finally struck off to *Jacob Williams*, he being the last and highest bidder, at the price of £392 17 6, which was at that time a fair and full price for it—that the sale was in all respects conducted fairly—that *J. Williams* owned the adjoining land, and was desirous of annexing this to his other possessions, and purchased for his own and sole use; but that after much importunity from the *feme* plaintiff, he agreed to let the plaintiff *Jesse* have the land at the same price he was to give, and his name was substituted in the account of sales for that of *Williams*, which was erased—that no deeds of conveyance were executed between the parties, as it was believed that the will and account of sales would be a sufficient title for the land—that on the 27th day of September, 1808, the plaintiff *Jesse* settled with two of the defendants, *Charles Cox* and *Kader Cox*, who had intermarried with two of the daughters of *John Thompson*, and paid over to them, and took receipts for the respective shares of their wives in the estate of their father, including the proceeds of the tract of land—that on the 27th day of July, 1815, he made a similar settlement with the defendant *Daniel Thompson*, who had then arrived at full age, and in like manner paid him, and took his receipt in full—that these settlements were full and fair, and were considered by the parties as such, and the receipts were regarded by them as discharges for their interest in the estate, both real and personal, of the testator, and were acquiesced in as such for many years, the defendants having had full knowledge of their rights when the settlements were made, and the receipts given—that believing himself to be undoubted owner of the land, the plaintiff *Jesse* had laid out and expended large sums of money in improving it, all which was done with the knowledge and acquiescence of the defendants, who lived in the neighborhood, and had never set up any claim to it for the space of twenty years—that notwithstanding all this, the defendants had at the September term, 1826, of Onslow Superior Court of law,

June, 1834.

Sanderlin v. Thompson,

brought an ejectment for the land, and at September term, 1827, recovered a verdict, and had judgment thereon; that on the trial, the plaintiff, *Jesse*, offered in evidence, the will of *John Thompson* as a part of his title, but it was rejected as inoperative to convey real estate, because there was but one subscribing witness thereto, whereby he was remediless at law. The prayer of the bill was for an injunction to restrain the defendants from enforcing their judgment at law, and for securing and quieting the possession and title of the plaintiff; or if the title to the land had not passed in equity to the plaintiff under the will, that her dower in said land might be decreed to the plaintiff *Sarah*, and that the defendants might account with the plaintiff for the monies laid out and expended in improving the land; also for the sums paid them as parts of the proceeds of the land, and for such other relief as the case might require.

The answers of the defendants admitted the death of their father *John Thompson*, the devise in his will, the marriage of his widow with the plaintiff *Jesse*, and the assumption of the executorship by him in right of his wife. They also admitted the sale of the land at the time mentioned, but denied that it was made in pursuance of learned legal advice, or in a regular and fair manner, and for a full price, and insisted that *Williams* did not purchase for his own use, but as the agent of, and for the benefit of the plaintiff *Jesse*. They also denied that their settlements with the plaintiff *Jesse* were fair and *bona fide*, and made with a full knowledge of their rights, but averred that the plaintiff *Jesse* had taken advantage of their youth, and ignorance of the provisions of their father's will, and had imposed such terms as he pleased upon them—that soon after ascertaining that they had not been fairly dealt by, they had applied to counsel who had informed them of their rights, and they then commenced the action of ejectment mentioned in the bill. They denied the right of the plaintiff *Sarah* to her dower in the land, because she had not dissented from the will of her deceased husband.

After the filing of the answer, the case was continued

for several terms, when in 1831, the plaintiffs by leave of the court filed an amended and supplemental bill, in which they stated by way of amendment to their original bill, that on the 29th day of March, 1826, they had, as executor and executrix of *John Thompson* executed a deed of conveyance to *Ann Graham*, wife of *Stephen Graham*, and sole heir of *Jacob Williams*, for the land purchased by said *Williams*, on the 3d of December, 1805, and that on the 30th March, 1826, *Stephen Graham* and his wife *Ann*, conveyed the same in fee to the plaintiff *Jesse*. The plaintiffs also stated that since the filing of the original bill, they had instituted proceedings in the County Court of Onslow, to have the will of *John Thompson* established as a will to convey real estate, and after obtaining a verdict in their favor in the County Court, the issue had been carried by appeal to the Superior Court, where, at March term, 1831, the said will was established as a will to convey real estate, and the proceeding therein being certified to the County Court, the will was duly recorded, and thereupon the plaintiff *Sarah*, who was then the sole surviving executrix to said will, qualified thereto, and letters testamentory issued to her. The plaintiffs alleged further that by the probate of the will as a will devising real estate, and by the qualification of said *Sarah* as executrix thereto, her acts under the same were validated, the probate having relation to the death of the testator, and thereby ratifying and confirming her prior acts.

Answers were put in to the amended and supplemental bill, but it is unnecessary to state their contents, or to detail the testimony taken in the cause, as the judgment of the court proceeded upon the facts disclosed in the pleadings above stated.

Devereux & J. H. Bryan, for the plaintiff.

Badger contra.

RUFFIN, Chief-Justice.—As the plaintiff's case was at the filing of the original bill, or rather as it is therein stated, and in the subsequent additions as to facts existing at the commencement of the suit, (which are proper

JUNE, 1834.

SANDERLIN v. THOMPSON.

ly amendments,) there was doubtless a ground for relief in this court. That case was, that the will was inefficacious to pass the land, and that the parties had dealt with each other under a contrary belief; that the plaintiffs had made a deed to the heir of *Williams* who had re-conveyed to *Sanderlin*, and that the latter had accounted with the defendants and the other children for their respective shares of the price of the land, as well as for the other parts of the estate, and had been in possession of the land and improved it, believing he had a good title, in which the defendants acquiesced.

The relief sought is, primarily, to be confirmed in the legal title by a conveyance from those to whom payment had been thus made, and to be quieted in the possession by an injunction against execution on the judgment at law; or if that cannot be, that dower may be assigned to the wife, the real estate being undisposed of; and that an account may be taken of the improvements, and of the whole estate, and a decree that the defendants shall refund whatever it may be found they have been overpaid in respect of the land, to be raised out of the land, and for an injunction in the mean time.

The case of *Craven* v. *Craven* (*ante* p. 344) approved and followed.

The claim for dower, it is true, is not sustainable; as it is now settled, in *Craven* v. *Craven*, that a widow for whom any provision is made in the will, is not dowable unless she dissent.

But certainly there ought in such a case, supposing it true, to be a decree for a conveyance from the heirs, they having received the price of the land. It would amount to a sale by them, and ought to be specifically executed. But it would be open to all the equity upon which defendants may resist that relief; as that the price was inadequate, or that they were mistaken in their rights. But in this case even a wider field of objection would be open to them, as no express sale, that is, by a particular contract with that view, is alleged; but only one implied from the payments. As to that, the case is, that all the parties had the idea, that the sale already made was valid. This would impose on the plaintiffs the burden of proving, at least, that it was a fair sale for an adequate

price, that *Williams* was a real purchaser, and himself substituted in his place by a subsequent and independent agreement, or that the children were fully informed of the real facts, and with that knowledge received the money upon a settlement, in which the land was included. Upon these points there is evidence, which it is not necessary to investigate minutely, as the decree will not turn on it. Upon its examination it is indeed far from satisfactory. It does not appear that any account in detail was rendered or settled; but round sums were paid to the children, as they respectively came to age, and receipts taken, in which there is no notice of the lands specifically; and there is no other direct proof that it was included. The probability also, that *Williams* purchased upon a previous agreement that the plaintiff should have the land, is so strong as to amount almost to a certainty. There is no evidence that the plaintiff communicated that fact to the defendants, or that they knew it. Indeed the bill affirms the contrary to be true, and that *Williams* did not buy for the plaintiff, but for himself. But as the decree will not declare these facts to be either way, as we do not proceed on them, and do not wish to conclude the parties upon them in any future litigation which may involve them, the examination of the evidence will not be further prosecuted.

It is plain that the material equity of this case arises upon the facts that the will did not confer a power to sell, and that the parties labored under a mistake upon that point—they thinking that it did, and treating the plaintiff as the owner. This equity would entitle the plaintiff to original relief, as an intrinsic equity of the case, independent of any proceedings at law. It rests upon the inability of a court of law to do him right, because his title is not a legal one. The judgment at law, and its mere legal injustice, does not create the equity of the case. Relief against the judgment is therefore merely collateral to the general relief to which the plaintiff is otherwise entitled; and is founded upon its being against conscience in the persons who have received the price of the land, as being effectually sold under the power, to

JUNE, 1834.

SANDERLIN v. THOMPSON.

take advantage of the want of it, and to insist on the legal title which they have, because they happen also to be the heirs of the testator, and so to insist in a court of law, where the present plaintiffs could make no resistance.

It seems to the court, for these reasons, that the new matter charged in the supplemental bill overrules the whole of this equity. It charges that pending the suit, the will has been proved as a will to pass real estate, and that the power created therein is valid, and infers that the probate relates back, and that the former sale is confirmed thereby, and that *Sanderlin* has now the legal title. Supposing that sale a fair one to *Williams*, we see no reason to question the correctness of those positions, either as the rules of equity or law. But admitting that the sale to *Williams* was only colourable, and therefore that the persons to take benefit under the power might impeach it in this court, there is nevertheless no jurisdiction here to entertain a bill of the present plaintiffs in respect of it, in which they allege that the power has been duly executed, and that under it one of them has the legal title. For the present, the case is considered upon its intrinsic equity, unaffected by the judgment at law which, in the sequel, will not be forgotten.

There is no equity in favor of the grantee of a power, nor of a purchaser under him, against the heir, to supply a defect in the creation of the power. But it is otherwise as to the purchaser, upon a defective execution of it.

It is true, that notwithstanding the power, the descent was not broken, and the legal title was in the heirs. But a power is not an equity arising out of the estate of the heir, but is itself a legal authority over that estate, whereby, when executed, it may be divested and vested in another to hold as under the instrument which created the power. There is no equity, therefore, between the grantee of a power, or the person in whose favor it has been executed, (supposing it not to be defectively executed,) and the heir. The grantee of the power has, to the extent of it, an absolute control over the estate at law, without the aid of this court, and therefore cannot ask such aid. He may, as between himself and those for whose benefit it was created, in a case of doubtful construction, apply for directions; but against the heir by

himself, and as such, there is no relief to be given.— There cannot be a bill by the grantee, where the power is clear in its terms, merely for a decree to sell, and to bind the heir beforehand, except so far as it may be necessary to establish the will, which contains the power; which is not one of the objects here. The will and powers being established, the heir does not join in the sale. Nor after a sale and conveyance can there be a bill to confirm the sale, and declare the conveyance valid. The plaintiff cannot state a case, involving those facts, which can have equity; for they turn every question and right as against the heir, into a legal one. There are cases in which it is laid down that there is a jurisdiction in equity, upon the bill of the owner of a legal estate in possession, to decree a deed, made or kept on foot by fraud, and under which another claims the legal title, to be delivered up to be cancelled. *Lord Thurlow*, indeed, thought that all that could be done was to perpetuate the testimony. But *Lord Eldon* ventured to say that he would give relief upon the principle of *quia timet*, because the deed was apparently a legal title, by which the possessor might be harrassed at law, and by the death of witnesses his title be defeated, though in truth the better one. But this can never be applied to a claim as heir, for there cannot be a fraud in the fact that he is heir.

One who has the legal title cannot maintain a bill to have an equitable claim upon his estate declared unfounded.

As little ground for relief is there against the defendants, regarding them as the persons beneficially interested under the power, as well as being the heirs.— There is no case in which it has been decided or said, that one, having or claiming to have the legal title, can come here to have it declared that another, who unjustly claims an equity arising out of that estate, has not such an equity. What comes nighest to it is a bill to foreclose. But that is essentially different. The mortgagee admits the equity of redemption to be a just right of the mortgagor, and submits that he may have the benefit of it: Only he insists that he should not always have it, and prays that he should exercise it in a reasonable time, or thereafter lose it. But although, after twenty years, a mortgagee may rely upon the time as a bar to the

June, 1834.

SANDERLIN v. THOMPSON.

mortgagor's own bill for redemption, there is no precedent of a bill by the mortgagor himself, to have that time declared a bar. The bar to an equity is a defence to a bill to enforce it; but can never make a case for a decree merely to restrain the future assertion of it.

The questions upon the fairness of the transactions, upon which depends the validity of the plaintiff's title in equity, supposing it valid at law, can therefore only be investigated when it shall be impeached in equity, by the persons interested under the power. The persons having the legal title cannot repel that right to impeach it by establishing its fairness now, while the other party does not allege its fairness in this court, but is asserting, at law, its legal invalidity.

Nor can the questions upon the validity of the legal title be drawn into this court, upon any idea that any thing will be deemed an execution of it here, which is not so at law, or that that the facts necessary to its validity can be better established here than at law. It may be doubted, indeed, whether a court of law would not be obliged to regard that as a good execution, which this court would not. For instance, if it be the fact that *Williams* purchased for the plaintiff, undoubtedly this court would set the whole aside, unless the acts or acquiescence of the parties have since confirmed it. But it is by no means certain that at law they could look beyond the deeds; for the question is upon their effect upon the legal title of the heir, and it does not follow that he could take advantage of a fraud on the parties for whose benefit the power was conferred. *Lord Coke* says indeed, that if a power to sell be given to two executors, and one renounce, he cannot buy from his companion, but the deed is void. This is upon the apparent fraud, or danger of fraud, and the whole appears on the face of the title. Whether the enquiry could be carried further may be questioned. But if it could, it must depend at law, upon precisely the same facts on which its validity, as a legal execution of the power, would be decided here as against the heir. There is therefore nothing in the case to call this court into action, unless it be the judgment at law, and

the state of the evidence on which the verdict was rendered; for the conveyances do apparently duly execute the power, which is a clear and explicit one to the executors, to sell upon the marriage of the widow; and the plaintiff has, upon the showing of his supplemental bill, the legal title.

What effect can the judgment, and the circumstances under which the verdict was obtained, have? For the plaintiff it is contended that at the trial he had not the legal title, though it turns out that he was then entitled to it, and that he has since got it; each of which circumstances gives him an equity, because the first made it unconscientious in the other party to sue at law, and at all events, the last makes it so to take out execution on the judgment, since the title on which it was given is now divested.

It has already been remarked that the primary object of the first bill was to obtain the legal title, upon the supposition that the will gave no means of getting it; and that, if obtained, was the sole object of that bill, except for an injunction as consequential to the principal relief. All the other relief sought is only in the alternative of not obtaining that. The case now is, that the plaintiff has that title, and that the mistake consisted in supposing that the power was not well raised. If he was entitled to it from the plaintiffs at law, or if they could have prevented him, and did prevent him from getting it, and by those means excluded him from his defence, then they did act against conscience, and the plaintiff ought to be relieved. Such the argument assumes to be the case—but the assumption is against the truth. The plaintiff had no right to call on the present defendants for the legal title. He had it potentially in himself, and culpably or ignorantly neglected to execute it. It has been shewn, that before being sued at law, he could not have framed a bill, stating himself to have a valid power, or an executed title under such a power, on which any relief could be decreed against the heir, because the plaintiff could relieve himself. By the same means he could have effectually defended himself against

June, 1834.

Sanderlin v. Thompson.

the suit of the heir. It is his own folly that he did not. It is not against conscience in the heir to enter and take the profits until a sale, as they are his right at law; and here the same persons were entitled both as heirs, and as those among whom the proceeds of a sale were to be divided. It would only be iniquitous in them if they had received those proceeds, and intercepted the legal title, which, in the actually existing case, they did not, and could not do. The only thing which could affect the conscience of the plaintiffs at law, would be that they were seeking to recover against one to whom they ought to convey the legal title, and who could not get it but from them. If he had it, there is no equity to prevent one legal claimant contesting the like claim of another, nor after a trial at law, to enable the latter to re-examine the case. If he had it not, but had a right to claim it from a third person, the same principle applies. There can be no equity between persons, between whom there is no privity.

It is not conceded, that the present plaintiffs had not the legal title, at the trial of the ejectment. It is supposed they had not, because the will had not then been proved as a will of lands, and *prima facie* it was not, as it had but one witness. This takes for granted that it could not have been proved on the ejectment. This proposition is not admitted, though it is not needful in this case to dispute, or to determine it. If it might have been then proved, it was entirely the fault of the party not to offer the proof, or the mere error in law of the court to reject it; and in neither case can this court help the party. But admitting that it was not evidence at law in that state, the subsequent probate establishes, against the present plaintiffs, that it was a good will, and the power over the real estate valid. These facts then existed, and there is no allegation in the bill that the parties were then ignorant either of the facts, or the evidence of them. Can this court, in such case, grant a new trial here, either upon the ground that the plaintiffs at law ought not to have got their verdict, or that they ought not now to proceed on it, as their title is now gone?

In the last point of view, the verdict is regarded as being rightful at the time. If the title is since divested, and vested in the present plaintiffs, their remedy is in a new action at law upon their title. In the former we think the rule is settled, that this court does not interfere with a verdict in any action, and again hear the matter upon its merits, or order a new action or issue to be tried at law, unless the matter which the party now shews, was not a defence at law, or unless he was prevented from shewing it by the fraud of the opposite party on the trial, or by mistake or accident, amounting to surprise. Whenever a legal title will be relieved against in equity, upon one of its own peculiar principles, of course an injunction will be granted to stop proceedings at law upon such title. But when the relief is sought upon the ground merely that the party has lost his defence at law by any of the above means, it is granted solely because the court of law would, according to its forms of proceeding, be unable to redress the injury, and thus be made the instrument of doing injustice. In ordinary actions, this is the consequence of their conclusiveness at law. Whether the principle extends to the action of ejectment, may therefore be questioned, because that is not conclusive, and the applicant here can, by completing his evidence, do himself justice at law.—Besides, it is probable that the only decree would be, to stay execution until another ejectment could be tried; for a court of equity has no right to draw to itself the determination of pure questions of law, which can be tried in the appropriate tribunals. If that be so, the only operation of the injunction would be as to the costs of the first trial; for which alone a bill will not, I believe, lie in any case, and especially to charge heirs, who have not been personally in fault. But however these points may be, there would be no ground for this injunction, were the action one in which the judgment is conclusive; because it was in the power of the parties claiming under the power, either to prove the will on the trial, or, at all events before it. They had the means of making it evidence; and they must abide the consequences of

June, 1834.

neglecting to do it. The bill and supplemental bill must, therefore, we think, be dismissed with costs.

PER CURIAM.—DECREE ACCORDINGLY.

ROBERT MARSH, *Ex'r. of* MILES SCARBORO,
v.
NANCY SCARBORO, *et al.*

Crumpler vs Chambers 77. 307

An executor who pays legacies voluntarily, without taking a refunding bond, has no equity against the legatees to compel them to refund, unless the debts for which the assets are deficient, are such as the executor had no notice of, when he paid the legacies, or unless some casualty has destroyed or impaired the value of the assets retained to pay them.

The plaintiff alleged that soon after he proved the will of his testator, he understood and believed that the debts due from the estate were few and of small amount, and that the assets not bequeathed in specific legacies, were amply sufficient for their discharge—that under this impression he delivered over to the legatees their respective legacies, without taking any refunding bonds from them—that he afterwards proceeded in administering the residue of the estate, and that debts to an amount larger than the assets in his hands, had been presented, and in paying them he had been compelled to advance his own funds. For the amount thus advanced, he prayed to be reimbursed by the defendants, who were the specific legatees.

The defendants denied that the plaintiff had exhausted the assets in his hands, objected that he had not pursued the directions of the acts of the General Assembly, in relation to executors and administrators, insisted that he should be held to strict proof of the allegations of his bill, and claimed the benefit of every legal objection to his recovery.

The plaintiff filed with his bill a copy of the inventory and account of sales of the estate of his testator, which he had returned to the County Court, and also a schedule of the debts paid by him in the course of admin-

ministration. No testimony was taken by either party, and the cause was heard upon the bill, answers, and exhibits.

Nash for the plaintiff.

W. H. Haywood & Waddell for the defendants.

GASTON, Judge.—The plaintiff has not made out a case which, according to the rules of this court, entitles him to relief. When an executor has voluntarily paid legacies, he is not in general permitted to institute proceedings against the legatees to refund. As it is his folly to make such payments before the amount of the estate can be ascertained, or his negligence in not acquainting himself with its amount, when that information may be obtained, neither of these grounds will entitle him to the interference of this court, and for that purpose, subject the legatees to the inconvenience of an account of the administration of the assets. There are certainly, however, excepted cases, in which the executor can demand this relief. If debts be afterwards made to appear, of which debts there was no notice when the legacies were paid; or if any casualty which could not have been reasonably anticipated, has, without fault or negligence in the executor, destroyed what was kept for the payment of the debts—these matters arising subsequently to his settlement with the legatees, may give him an equity to call on them to refund what he needs for the satisfaction of creditors. But then the matters constituting this equity must be distinctly set forth in his bill, for obvious reasons. One is, to shew the right of the plaintiff to have what he asks of the court; and another is to enable the defendants to put in issue the matters upon which that right depends. The bill in that case is wholly insufficient. It sets forth *no accident* which has destroyed the estate, or impaired the value of the assets, and it does not charge *what* debts, if any, have been demanded since the payment of the legacies, of which the executor then had no notice. Had the bill, however been sufficient, no relief could be given, unless its material allegations were either admitted or proved.

JUNE, 1834.

WARD v. WARD.

Here the statement in the bill, vague as it is, that the amount of debts exceeded the assets retained by the executor, is wholly denied; the presumption of the law is against it; and there is *no* evidence of any sort to support the allegation, or to contradict the presumption.

The bill must be dismissed, and at the costs of the plaintiff. As it is possible, however, that the plaintiff may have rights which can be shown on a proper bill, this dismission is directed to be made without prejudice.

PER CURIAM.—BILL DISMISSED.

MARY WARD v. SETH WARD, *et al.*

In suits by married women, a *prochein amy* is necessary not only to secure the costs, but when her husband is a defendant, to interpose a suitable adviser; and this rule is not dispensed with, even where the wife sues in *forma pauperis*.

The plaintiff being entitled to a separate estate under a marriage settlement, filed her bill, by permission of the court, in *forma pauperis* against her husband *Seth Ward*, *Henry G. Montford*, the trustee, and *Edward Williams*, which last named defendant was charged with having in his possession, claiming as his own, some of the property belonging to the plaintiff under the marriage settlement, he having notice of the plaintiff's title, at the time he purchased it.

The prayer of the bill was to have an account taken of the estate under the settlement, and that the present trustee might be removed and another appointed, and that the trust fund be secured. The defendant *Williams* demurred and for cause of demurrer, among others especially assigned this, that the plaintiff is a feme covert and has no right to sue alone.

On the last circuit, at Onslow, his Honor Judge DONNELL overruled the demurrer, and the plaintiff, under leave of the Court, appealed.

Bryan for the plaintiff.
Devereux for the defendants.

JUNE, 1834.

WARD v. WARD.

DANIEL, Judge.—After stating the material fact as above, proceeded.—A feme covert having a separate estate, may in a Court of Equity be sued as a feme sole, and be proceeded against without her husband, for in respect of her separate estate, she is looked upon as a feme sole. In *Dubois* v. *Hole*, (2 *Ver.* 614.) Mr. *Raithby* the annotator, has collected and digested all the authorities on this question. In a Court of Equity, *baron* and *feme* are considered as two distinct persons and therefore a wife by her *prochein amy*, may sue her own husband. The question to be settled on this demurrer is, can she sue alone, in *forma pauperis*. The courts of equity, as well as the courts of law, permit persons to sue in *forma pauperis*, when proper affidavits are made. (2 *Mad. Ch.* 256.) But I can find no case where a wife has been permitted to sue her husband in that character. I cannot find any case, where the wife has been permitted to sue alone in a Court of Equity.—Where the husband is made a party defendant, the invariable practice is, for the feme covert to sue by her *prochein ami*. The rule is established, I expect, not only to secure costs, but to have a responsible person who would be liable if the process of the court should be abused, and also that a proper and fit adviser might interpose to prevent domestic feuds, and at the same time protect the feme from the frauds and power of the husband. (3 *P. Wms.* 39.)

The plaintiff asks leave to amend her Bill by adding a *prochein amy*. This is an appeal under the late act of Assembly, from an interlocutory decree, This court has no power to make any order or decree in the cause, except on the point appealed from. We are of opinion that the court below erred. in overruling the demurrer; it should have been sustained. This opinion will be certified to the court below.

PER CURIAM.—DECREE OVERRULED.

June, 1834.

Tully Jackson v. John H. Blount *et al.*

A mortgagee who purchases the mortgaged premises at sheriff's sale, upon a parol agreement to hold them as a security, is, in equity, a mere incumbrancer, and parol evidence of the agreement may be received, notwithstanding the sheriff's deed be absolute.

Upon the pleadings and proofs in this case, it appeared that on the 18th day of April, 1827, the plaintiff, by an absolute deed of bargain and sale, in which the sum of one hundred and ninety-six dollars was recited as a consideration paid to him by *James Stanton*, conveyed to the said *Stanton* in fee the tract of land on which he resided, and that at the same time *Stanton* executed to the plaintiff a written declaration, setting forth that the object of the conveyance was to secure the re-payment of that sum, with interest, and promising on the part of *Stanton* to reconvey the land whenever such re-payment should take place. The deed was shortly thereafter registered; but the defeazance had never been registered. The tract of land was proved to have been worth about six hundred dollars, and the plaintiff retained the possession of the whole of it until the year 1830, and of a part of it until this time. On or about the 10th of July, 1829, a sale was made of this land by the sheriff, upon an execution against the plaintiff, at the instance of a creditor; and at that sale, *Stanton* became the purchaser at the price of seventy-five dollars, gave his note to the creditor in discharge of the judgment, and took a deed for the land from the sheriff, in which it is described as the same land heretofore conveyed by *Jackson* to *Stanton*. It was in proof also, that on the day of the sheriff's sale, *Stanton* informed the execution creditor that he had a lien on the land, but had no objection to a sale, provided he could become the purchaser, and hold his title under such sale, as he did that under his deed, as a security for his advances; that thereupon they proceeded together to the place of sale, where *Stanton* bought, the plaintiff not being present; and that on the land being bid off, he quieted the plaintiff's wife, who seemed uneasy, by declaring that all he wanted was to secure the re-payment of what

he had advanced, or might advance. There was a satisfactory proof also, that after this sale, *Stanton* and *Jackson* recognised each other as still standing in the relation of creditor and debtor, and the sheriff's conveyance, and *Jackson's* conveyance as securities for the payment of the debt. Messages were sent to *Jackson* to liquidate and pay off the debt. An arrangement was made by him for letting out the land, to take up the notes given by *Stanton* at the Sheriff's sale, and on *Stanton* being apprised of it, he told the plaintiff that he could afford to pay as good a rent for the land as any body, that he would be satisfied with an arrangement which would pay off all his demands, but he did not approve of one which was to discharge his last lien only, for he looked upon that as his best title. In the next year, (1830,) *Stanton* occupied accordingly a part of the land, *Jackson* retaining possession of the residence.—Before the close of that year *Stanton* died. The guardian of his infant heirs at law then instituted an ejectment in their names, and prosecuted it to judgment against *Jackson*, who filed this bill to enjoin their further proceedings, and to redeem the mortgaged premises.

Kinney for the plaintiff.

Mendenhall for the defendants.

GASTON, Judge.—After stating the facts as above, proceeded:—Upon these facts it is manifest that the relation of mortgagor, and mortgagee did originally exist between the plaintiff and the intestate, the ancestor of the defendants. It is almost equally plain that whatever might be the form of the proceedings at the sheriff's sale, or the legal effect of the sheriff's deed, the mortgagor and mortgagee intended by this latter transaction, but the removal of an incumbrance which for some cause or other was supposed to affect, and which by reason of the non-registration of the defeazance, did affect the mortgaged property, and it would follow from the acknowledged principles of a court of equity, as well as from the plain intent of the parties, that the re-

JUNE, 1834.

JACKSON v. BLOUNT.

lation of mortgagor and mortgagee, continued after the sale, and that the sheriff's deed was but a further security to cover the further advances made. Objections however have been made to the receiving of the proofs. It was insisted that as the Sheriff's deed was absolute, the admission of these proofs would be not only a violation of the rule which forbids a written instrument to be contradicted, varied or explained by parol, but is an attempt to set up a parol contract in relation to lands, in contradiction to the act of 1819, entitled an act to make void parol contracts respecting lands and slaves. Neither of these objections appear to us well founded. With respect to the former, it may be remarked in the first place, that the testimony is not offered to explain or vary the contract between the sheriff and the purchaser at execution sale, who alone are the parties to the conveyance of the sheriff, and secondly that it has been long since settled (see case of *Streator* v. *Jones*, 3 *Hawks*, 423) that in equity, facts and circumstances *dehors* an absolute deed—such as inadequacy of the alleged price, possession remaining with the supposed vendor, and the supposed vendee claiming still to continue a creditor for the money advanced—may be received in evidence, to shew that the purpose of the conveyance was to give a pledge or security for the repayment of the money.—Nor is it apprehended, that this rule of equity is at all affected by the act of 1819. But at all events, in this case, the original right of the plaintiff to redeem is evidenced by the written agreement of *Stanton*, and the facts connected with the sheriff's sale are properly examinable in order to ascertain whether, in that transaction, *Stanton* acted in his individual, or in his fiduciary character. If in the latter, neither he nor his heirs can set it up to the injury of the plaintiff.

Facts and circumstances *de hors* an absolute deed may, in equity, be proved, to show that it was executed merely as a security.

The case of *Streator* v. *Jones* (3 *Hawks*, 423) approved.

The court is of opinion that the plaintiff is entitled to redeem, and therefore doth direct the usual accounts to be taken.

PER CURIAM.—DIRECT AN ACCOUNT.

June, 1834

FREDERICK KIMBOROUGH *et al.* v. NICHOLAS SMITH.

An absolute deed declared to be subject to a *proviso* for redemption, upon proof that the vendor was an ignorant and impoverished man—was the father-in-law of the vendee—had been upon a treaty with the latter to raise money upon loan—that the purchase was an unequal one—and was the balance which the vendor owed for the same land—together with the fact that he occupied the land for twenty-four years without paying rent, and other attendant circumstances.

The material allegations contained in the bill and supplemental bill of the original plaintiff, *Frederick Kimborough*, were, that on or about the 1st January, 1803, being greatly pressed to raise the sum of $300, which he owed in part of the price of the tract of land upon which he resided, he applied to the defendant, his son-in-law, to assist him in this difficulty—that the defendant agreed to advance this sum, and to take for security a bond from the plaintiff to convey the land in case of failure to repay the money lent—that accordingly the money was advanced, and an instrument prepared by the direction of the defendant, which the plaintiff, who was wholly illiterate, understood and believed to be such as had been agreed upon, and under such understanding and belief executed—that the land very greatly exceeded in value the sum advanced—that from this period up to the filing of the original bill, (September, 1827,) the plaintiff had continually resided on the land as his own, paying the taxes, but neither paying nor called upon to pay any rent—that the defendant, during this period, had repeatedly admitted the plaintiff's right to redeem, and declared that he had no other claim on the land than as a security for the money—that the poverty of the plaintiff had rendered him unable until then to make this redemption, but now, by the assistance of his friends, he was empowered, and desired to do so, and had tendered the sum lent and its interest; but that the defendant most unconscientiously refused to permit him to redeem, rejected the tender, and claimed the land as absolutely his own under the instrument aforesaid, which purports to be an unqualified conveyance in fee simple. The plain-

June, 1834.

KIMBOROUGH v. SMITH.

tiff avered that he never did sell nor agree to sell the land to the defendant—that the distinct agreement between himself and the defendant was for a loan of money and a pledge of the land, under a bond to make title as a security for its re-payment—that he executed the deed under a full belief that it was but such a security, and under an entire misconception of its contents and legal operation. The prayer of the original bill was to be permitted to redeem, and for the defendant to re-convey. The supplemental bill which was filed in 1829, brought forward the fact that the defendant had since commenced an action of ejectment against him and prosecuted it to judgment, and prayed that the execution on this judgment might be enjoined.

The defendant, in his answer to each of the bills admitted that the plaintiff applied to him for money to pay for what was due for the land, but denied any agreement on his part to lend or to take any security or lien on the land for the re-payment of the money; insisted that he purchased the land absolutely at and for the price of three hundred dollars, which was represented to him as the amount of the plaintiff's debt—that in execution of this contract of sale, he paid the $300 to the plaintiff, and received from him an unconditional deed in fee simple, which the plaintiff executed after hearing the same distinctly read over, and approving of it—that after this he went with the plaintiff to the agent of the plaintiff's creditors, and there found that besides the $300, there was $50 due for interest, which additional sum the defendant then paid, and the plaintiff's bonds were then taken up—that the defendant gave a fair price for the land; or that if it was rather low, the plaintiff could not complain, as the defendant, from motives of affection, permitted him for more than twenty years to live upon it, and receive its profits rent free; denied that the defendant ever admitted the plaintiff's right to redeem, or that defendants only claim on the land was as security for re-payment of the money advanced by him, and denied any tender, unless it be that *George Kimborough*, a son of the plaintiff, had a few weeks before ask-

ed him if he would receive the money; to which question the defendant answered by asking him if he had it—that these mutual questions were asked twice, but nothing further said or done in relation to a tender. JUNE, 1834. KIRKSEOVER v. SMITH.

It appeared that the injunction granted on filing the supplemental bill, was, on coming in of defendant's answer thereto, dissolved with costs—that a general replication was entered to the answers—that the original plaintiff died, and his heirs at law were made parties plaintiffs in his stead; and the parties having taken their respective proofs, the cause was set down for hearing and then removed into this court.

Many depositions were read at the hearing, which it is unnecessary to state.

W. A. Graham for the plaintiffs.

Nash and *Winston* for the defendant.

GASTON, Judge, after stating the pleadings as above, proceeded as follows:

There is much difficulty in ascertaining, at this day, the truth in regard to this remote transaction, when many of those who were best able to throw light upon it have been removed by death. Neither *Wiers*, who it appears wrote the deed, nor *Jacob Smith*, or *James Wells*, (which two last were the subscribing witnesses to it,) have been examined on the part of the plaintiffs or defendant. We can account for this omission on both sides only by the presumption that the testimony of none of these can now be had. There are however, some facts about which little or no doubt can be entertained. At the time of the transaction, the plaintiff was indebted $800 on account of the purchase of this land, which he was anxious, and pressed and unprepared to pay. This was known to the defendant, who expressed a disposition to assist the plaintiff, and to take a security upon the land for re-payment of the money. The plaintiff lived upon the land, which was then worth from $860 (the lowest) to $1200 (the highest estimate,) and owned scarcely any property beside. The whole of the money paid by the defendnat was precisely that needed for the

June, 1834.

KIMBOROUGH v. SMITH.

creditor, and was paid over to him. Both the parties are represented as Germans, with very little knowledge of the English language, and the plaintiff is illiterate, and can neither read nor write. A deed absolute in its terms was executed when the money was advanced, and for twenty-four years afterwards the plaintiff enjoyed the land, paid the taxes for it, but paid no rent. And the defendant was the plaintiff's son-in-law. Besides these, which we regard as ascertained facts, many witnesses testified to declarations of the defendant, that all he wanted was his money and interest—that the old man might redeem, but no one else should, and that the whole must be paid in a lump. There is also evidence of declarations of the old man, who seems to have been never able to redeem by his own means, that the land was *Smith's*, that his creditors could not touch it, and at one time that he would no longer pay taxes for it. As we are disposed to rely very little on the testimony as to the declarations of either party, by witnesses who probable imperfectly understood, and have partially forgotten what they have heard, and do not very intelligibly relate what they remember, it is sufficient to say that the general effect of this testimony is to confirm the opinion which we have formed upon the facts that we consider as without doubt. There is no evidence of a tender.

It is a rule with all courts to consider the solemn deed of a party as containing the deliberate and well-weighed terms of his contract, and not to permit these terms to be enlarged or restrained, explained or contradicted, by parol evidence. But upon a proper suggestion that through fraud, imposition, oppression, accident, surprise or mistake, such deed was not made conformably to the terms upon which the parties had agreed, and which the deed was to have expressed, a court of equity will examine into the verity of this suggestion, and upon that being established, will grant relief against the deed, because it is unconscientious that the party should be bound thereby. In receiving such suggestions, and in weighing the proofs by which it is attempted to support them, the

court usually acts with great caution. But it would be unsuited to the exigencies of human society, if while it uniformly adhered to the same *principles*, it should require in all cases the same amount of *testimony* to satisfy its judgment. The nature of the transaction to be investigated, the relative situation of contracting parties, the usages of business, and the ordinary motives of human conduct, may render the inference of an equity *dehors* the deed, scarcely possible in one case, and quite probable in another—may require for it so complete a demonstration in the former as is seldom to be attained, and permit it to be drawn in the latter from comparatively slender evidence. In *all*, the allegation of surprise or fraud must be established before the court will act; but different degrees of proof are required according to the probability, or improbability of the charge.

June, 1834.

Kimborough v. Smith.

Courts of equity view with much jealousy absolute conveyances taken from embarrassed men, after a negotiations for a loan of money. They regard such persons as in a state approaching to moral duress, liable, [illegible] goaded on by distress into submission to whatever terms may be exacted; heedless of the forms, and inattentive to the words with which the transaction may be veiled; and thus peculiarly exposed to mistake and surprise, as well as to imposition and oppression. Where the written contract clearly conforms to that on which the parties had agreed, equity will often relieve, because its terms are hard and grinding, and it readily receives evidence of the surrounding circumstances of the transaction, to shew that the written instrument does not in truth conform to the terms on which the parties had agreed. We hold it to be clearly settled that if *these circumstances* do establish that the parties really contracted as borrower and lender, and that what purports to be a sale and purchase, covers a loan of money and security for its re-payment—unless there be some explanation why the written instrument does not correspond with the precedent agreement—it will treat the instrument not as an absolute conveyance, but as security for the re-payment of money lent; will hold the lender

Absolute deeds taken from embarrassed men after a treaty for a loan, are viewed [illegible] Courts of Equity.

June, 1836.

KIRKSEGOOR v. SMITH.

entitled, not to the thing pledged, but to his money for which it was pledged; and will permit the borrower, on re-paying what is justly due, to redeem what was pledged for its re-payment. It arrives at this conclusion principally from a consideration of these extraneous facts, and regards as of comparatively little consequence, the loose conversations of the parties. Among the circumstances which it deems of high moment when engaged in this enquiry, are a striking disproportion between the sum advanced, and that for which the property might have been sold—the apparent vendor retaining possession, as if no deed had been made—the vendee receiving no rents, or only rents to the amount, or in lieu of interest. We have seen that in the present case there is this disproportion, the money being only about one-third of what such land then sold for in the neighborhood. The man who appears to have made the absolute deed retains the possession, and enjoys the profits for twenty-four years afterwards, and pays no rent. But there are very strong additional circumstances. A loan and a pledge of the land were at one time *intended*, and except from the deed, there is no evidence of a change of intention. The sole object for which the money was wanted, and was known to be wanted, was to enable the applicant to hold this land, the home of himself and his family. The sum advanced was precisely that needed, and known to be needed for this purpose, and was all paid over to him whose claim it was necessary to remove. No benefit could result, but a certain and vast injury did result to him who sought the favor, unless this advance was in the nature of a *loan*. And if it were a loan, the *only* security which could be given must have been upon this land. Add that the plaintiff was illiterate and almost wholly ignorant of the language in which the deed was written, that the relation between the parties was such as to inspire confidence, and occasion carelessness, and that unquestionably the defendant has often expressed a willingness for a redemption, and we think we cannot err in pronouncing that the deed was not designed to make an absolute conveyance of

the property. Its original purpose was a security for money, and it was drawn in its present form either by imposition on the grantor, or as we rather believe, from the mistake of the parties, and was afterwards unconscientiously set up by the defendant as an absolute conveyance. We hold, therefore, that the plaintiffs are entitled to redeem, and that for this purpose an account must be taken of whatever advances the defendant has made upon the faith of this security, and of the rents which he has received since he has gained possession.

PER CURIAM.—DIRECT AN ACCOUNT.

INDEX.

ADMINISTRATORS.

Vide Executors and Administrators.

ACCORD AND SATISFACTION.

An assignment by an executor of a bond due his testator to a creditor who has established his debt, and has a *sci. fa.* awarded against the heir, may be pleaded by the latter as an accord and satisfaction. *Armsworthy* v *Cheshire*, 235–236

Vide Receipt.

ACCOUNT.

1. Upon a bill to correct a settled account for specified errors, such errors only can be corrected as arose from fraud or mistake; and the plaintiff cannot surcharge and falsify, as to an item of the account assented to at the settlement with a full knowledge of the facts. *Compton* v *Greer et al.* 93
2. And where the bill also sought to set aside the settlement as obtained by undue influence, it was held that the plaintiff by consenting to a reference of the account upon the basis of the settlement with liberty to surcharge and falsify, had waived the relief sought upon the ground of undue influence. *Ibid.* 93
3. Wherever the defendant is the agent, bailiff or receiver of the plaintiff, a court of equity has jurisdiction for an account. *McCaskill* v *McBryde*, 267
4. Courts of Equity take jurisdiction in all matters of account—and where the administrator of a principal debtor agreed with the surety to confess assets to the action of the creditor, upon condition that the surety would pay the residue of the debt, deducting the assets really applicable to it, as an account of the administration is necessary to the relief of the administrator, his bill will be sustained. *Jones* v *Bullock*, 368

Vide Executors and Administrators, 32.

ACCOUNTS.

Accounts referred to in a will become testamentary and may be used in explanation of the testator's intention. *Bullock* v *Bullock*, 318

ANSWER.

1. Per Ruffin, J. Where the solvency of the debtor, and the loss of the debt by the neglect of the administrator, are alledged in the bill, and the defendant in answer to an interrogatory framed upon that allegation, denies the solvency and neglect, the answer is proof for the defendant, and it is incumbent on the plaintiffs to disprove it. *Finch* v *Ragland*, 140
2. Where in such case the fact of solvency or insolvency does not appear upon the proofs satisfactorily to the court, a further inquiry will be ordered before the master. *Ibid.* 140
3. An answer denying the bill must be disproved by two witnesses to entitle the plaintiff to a decree. *Jones* v *Bullock*, 369
4. An answer which is responsive to the bill, and contains a clear precise and positive denial of it, must be disproved by more evidence than the testimony of one witness, to entitle the plaintiff to a decree, *Armsworthy* v *Cheshire*, 456
5. An issue should not be directed simply because the answer is contradicted by one witness. *Ibid.* 464
6. Nor where the witness is supported by circumstances which, connected with his oath, discredit the denial of the defendant. *Ibid.* 464
7. But one is proper where between the witness and the answer, circumstances in evidence create an inclination in favour of the former, without estimating the interest of the defendant. *Ibid.* 464
8. An answer replied to, is evidence for the defendant only when it is responsive to the bill. *Gillis* v *Martin*, 473

Vide Decree 2, 3.

APPEAL.

1. An equity case cannot be *removed* to

to the Supreme court, under the act of 1819, (*Rev. c* 962,) when it is only set for argument upon a plea. In such case, it cannot come up otherwise than by appeal. *Littlejohn* v *Williams*, 380

2. On an appeal in equity, the Supreme Court is confined to the proofs upon which the decree sought to be reversed, was founded. *Gillis* v *Martin*, 473

Vide Decree, 1.

ARBITRATOR.

Vide Award, 1, 2, 3.

ASSIGNMENT.

1. The obligee of a bond in suit having assigned it verbally as a security to a creditor, and given him the custody of it, with authority to conduct the suit, and the obligor, with notice of the assignment, having paid the debt to the obligee, and taken a release from him—in equity the interest of the assignee will be protected, and the obligor enjoined from pleading the release to the action at law. *Ellis* v *Amason*, 273

2. Notice of the assignment of a bond should be direct, in order to charge the obligor with a wrongful payment of it; but notice may be proved otherwise than by [illegible] the assignee. *Ibid.* 279

Vide Partnership, 8, 9.

ATTORNEY AND CLIENT.

1. A party to a cause is bound by any agreement respecting it, made by his attorney, notwithstanding the latter may have disobeyed his instructions. *Pierce* v *Perkins*, 252

2. And where the attorney of a non-resident appears before an arbitrator, and examines witnesses, his client is bound by the award, although the attorney was only to act in court. *Ibid.* 253

AUCTION SALES.

Persons may be permitted to unite in an association by which one shall bid at a public sale for the benefit of all concerned, when the motive for such association is not dishonest, nor the object nor the effect of it, to produce an improper result. *Goode* v *Hawkins*, 393

AWARD.

1. In a general reference of a matter in dispute, the arbitrator may decide upon moral and equitable considerations, and where he intended to decide according to law, a mistake to vitiate the award must appear upon its face. *Pierce* v *Perkins*, 250

2. An error in judgment in an arbitrator, is no reason for setting aside his award. *Ibid.* 251

3. An arbitrator can, with the consent of the parties, act upon the statements of witnesses not under oath; but it is misconduct in him, without consent, to examine a witness in private. *Ibid.* 253

Vide Attorney and Client.

BANK STOCK.

Vide Corporation,—Legacy, 39.

BEQUEST.

Vide Emancipation,—Legacy, *passim*,—Will, *passim*.

BILL.

A bill charging that the defendants were the agents of the plaintiff, and also executors of a former agent, and seeking by reason of their having received assets of their testator, to charge them with the balance due by him, is not multifarious. *McCaskill* v *McBryde*, 265

Vide Decree, 4.

BILLS AND PROMISSORY NOTES.

Where a note is endorsed upon which nothing is due, it is a fraud, and notice is unnecessary to subject the endorser.—*Bissell* v *Bozman*, 162

BOND.

Vide Assignment, 1, 2,—Vendor and Purchaser, 2.

BRIDGE.

Where the Legislature incorporated the plaintiffs, for the purpose of building a bridge, and authorised them to collect such an amount of tolls as was necessary to keep the bridge in repair, and the defendant erected another bridge in the vicinity over the same river, which diverted the travelling, it was held that to entitle themselves to relief, the plaintiffs must show that their bridge was always in good repair. *Free Bridge Company* v *Woodfin*, 113

CAPTAIN.

Vide Master of a Ship.

CASES APPROVED.

1. The Attorney General v Hunter (ante 1 vol. 12) and the Attorney General v Blount (4 Hawks' 38) in Eason v Perkins, 38
2. Potter v Stone (2 Hawks' 30) in Clarke v Cotton *et al*, 51
3. Keaton v Cobb (ante vol. 1, 439) in Newsom v Bufferlow, 67
4. Bailey v Shannonhouse (ante vol. 1, 416) in Brotten v Bateman, 115
5. Petty v Harman (ante vol. 1, 191) in Villines v Norfleet, 173
6. Robards v Wortham (ante 173) in Palmer v Armstong, 269
7. Boyd v Hawkins (ante 195) approved in part, in Boyd v Hawkins, 329
8. Doe v Hyman (ante vol. 1, 382) in Fraser v Alexander, 351
9. Bryan v Bryan (ante vol. 1, 47) considered, and the rule there adopted declared to be general, in Lassiter v Dawson, 384
10. Hines v Lewis (Tay. Rep. 44) and Whitbie v Frazier (1 Hay. Rep. 275) in Thornegay v Carroway, 405
11. Tolar v Tolar (ante vol. 1, 456) and Price v Sykes (1 Hawks' 87) in Morris v Ford, 412
12. Craven v Haywood (2 Car. Law. Rep. 557) Huckaby v Jones (2 Hawks' 120) Contentnea Society v Dickerson (1 Dev. Rep. 189) Stephens v Ely (ante vol. 1, 493) in Redmond v Coffin, 441
13. Craven v Craven (ante p. 344) in Redmond v Coffin, 456
14. Poindexter v McCannon (ante vol. 1, 373) in Gillis v Martin, 474
15. Bissell v Bozman (ante p. 229) in Gillis v Martin, 476
16. Ryan v Blount (ante vol. 1, 382) and Wood v Brownrigg (3 Dev. Rep. 430) in Mitchell v Robards, 478
17. Stow v Ward (3 Hawks' 604) in Ward v Stow, 509
18. Craven v Craven (ante p. 344) in Sanderlin v Thompson, 543
19. Streator v Jones (3 Hawks' 423) in Jackson v Blount, 557

CASES OVERRULED.

1. Boyd v Hawkins, (ante 195,) in part overruled in Boyd v Hawkins, 329
2. Stow v Ward, (1 Dev. Rep. 57,) in Ward v Stow, 509

CLERK.

Vide Creditors, 1, 4, 5, 6, 7

CLERK AND MASTER.

Vide Reference to Clerk and Master, 1, 2.

CODICIL.

Vide Will, 3, 4.

COMPENSATION.

Vide Exchange.

CONDITIONAL SALE.

Vide Mortgage, 3, 4.

CONTRACT FOR THE SALE OF LANDS.

1. A contract which involves an agreement for the sale of land, is within the purview of the act of 1819, and may be avoided, unless signed as the act directs. *Clancy* v *Crain*, 365
2. And where the contract comprises something else, an avoidance of a part, avoids the whole. *Ibid.* 365
3. A vendee who avoids a parol contract for the sale of land, cannot call upon his vendor for compensation. *Ibid.* 365

Vide Lapse of time, 10, 11—Pleading, 4.

CORPORATION.

A corporation has no right to retain the stock of an insolvent corporator to secure a debt due from him. Whether a by-law subjecting the Stock of corporators to debts due the corporation will give them this power. Qu? *Hart* v *State Bank*, 111

COSTS.

1. Costs are not given against a married woman in a suit for matters occurring after the coverture, and to which she is an unnecessary party. *Brownrigg* v *Pratt*, 50
2. One who defends an ejectment upon an equitable title, cannot in equity recover his own costs at law, but he may those he has paid the plaintiff at law.—*Newsom* v *Bufferlow*, 67
3. Testimony in a suit in equity must be reduced to writing, and if a party upon a reference to the clerk examine witnesses *viva voce*, instead of taking their depositions, he must pay the costs of their

attendance. *Tayler* v *Cawtherne*, 221
4. The costs of a suit to settle a partnership, are generally charged upon the partnership effects; but improper conduct in one of the partners, may be punished by taxing him with them. *Ibid.* 222

Vide Practice 6.

CREDITORS.

1. Where two creditors obtained judgments against their common debtor, at the same time, and the clerk wrongfully issued an execution to one of them, whereby the other obtained a priority, in the absence of a fraudulent combination between the clerk and the creditor thus preferred, a Court of Equity will not deprive the latter of the advantage he has thus gained. *Bank of Newbern* v *Jones*, 284
2. An agreement between two creditors, to refer the decision of their rights to a court, will, in equity, prevent either of them from acquiring a priority, pending the reference. *Ibid.* 288
3. If a debtor can, at law, give one creditor a priority, a Court of Equity will not restrain him from doing so; because the favored creditor gets nothing but what he has a right to receive. *Ibid.* 289
4. Where two creditors are equally entitled to executions, and the clerk refuses to issue in favor of one of them, it is not a case of preference. *Ibid.* 289
5. And *it seems* that the creditor has no redress against the other, unless perhaps, where the latter induced the clerk not to issue the execution of the first. *Ibid.* 290
6. His only remedy is upon the official bond of the clerk; and the measure of damage is the actual loss sustained by his misconduct, without reference to his motives. *Ibid.* 291
7. Whether the insolvency of the clerk and his sureties would make any difference. Qu? *Ibid.* 292
8. Between creditors, whose equities are equal, he who has the legal title prevails. But where he who had the legal title, had notice at the time he advanced his money, of an equity in the other, he is postponed. As where a note was endorsed to A by B, as a security, and A made subsequent advances to B, some before and some after he had notice that the maker had an equitable set-off to the note, it stands as a security to A only for advances made before notice. *Kerr* v *Cowen et al.* 356
9. It is not fraudulent for a debtor to prefer one *bona fide* creditor to another.—*Sellers* v *Bryan et al.* 362

Vide Executors and Administrators, 19,—Sureties, 1, 2, 3.

CROPS.

Vide Devise, 6, 7.

DECREE.

1. Where a decree pronounced in the Superior Court does not ascertain any fact, nor declare any principle upon which it was founded, but simply dismisses the bill, on appeal, the decree is not, of course, reversed, but the cause will be re-heard upon the proofs. *Pike* v *Armstead*, 24
2. No decree can be pronounced for the plaintiff upon a bill suggesting fraud in procuring a deed and praying to have it cancelled, and for a re-conveyance, where the answer and proofs do not support the allegations, but establish a case entitling the plaintiff, upon a proper bill, to a redemption. *Brownrigg* v *Pratt*, 44
3. The plaintiff sometimes obtains a decree solely upon the admission in the answer, but the admission must have some reference to the case made by the bill, and not be entirely in avoidance of it. *Ibid.* 49
4. Relief never can be given, which is directly contrary to the prayer of the bill—as if the prayer is, that a deed be cancelled, a decree in affirmance of it will not be made. *Ibid.* 50
5. Where to a bill by the next of kin, against the executors and legatees, the latter relied upon a former decree, pronounced in a cause between the same plaintiff and the executors, commenced after the legal estate of the legatees was complete, but the executors did not plead it, nor in any way rely upon it, the de-

cree was held not to be a bar. *Redmond* v *Coffin*, 437

Vide Answer, 3, 4.

DEED.

Vide Practice, 5,—Surety, 5.

DEMURRER.

Vide Pleading, 5.

DEVISE.

1. Where a testator directed his estate to be kept together until one of his five children married, or should arrive at &c. and then the one marrying or arriving at &c. to receive a share, and the residue to remain undivided for the other children, "leaving the manor plantation at a valuation of $4000 for the youngest child that may be then living, *it was held*, that the testator contemplated several divisions; that the manor plantation was to be taken by the child who was the youngest at the last division; and that in the division it was to be taken as land, and not as personalty.—*Wilder* v *Mixon*, 10
2. Where a parent is making provision by will for his children, it is presumed that he intended to extend the benefit to their issue unless the contrary expressly appears. *Cox et al.* v *Hogg*, 125
3. Where a clause of survivorship is attached to words which create a tenancy in common, it is construed as referring to some definite period. And this period is determined by the circumstances of each case. *Ibid.* 125–126
4. In preference to a general survivorship, the death of the testator is taken as the true period. *Ibid.* 126
5. In a gift by will to a child and grandchildren, "equally to be divided," each of the latter take equally with the former, unless a different intention is inferred from other parts of the will.—*Martin* v *Gould*, 305
6. Crops growing upon land, at the death of the devisor, go to the devisee. *Jones* v *Jones*, 392
7. Between the heir and the executor, the growing crop goes to the latter; but between the executor and the devisee the rule is different. *Smith* v *Barham*, 423
8. A testator having directed that the "the residue of my estate real and personal, be divided among the heirs of my brother J, the heirs of my sister N, and the heirs of my sister S, and nephew L;" it was held, the testator having recognised J, as being alive, that the word "heirs" was used as a description of legatees only, and not in its appropriate technical sense, as denoting the succession, and that the individuals of the several classes of children, were entitled *per capita*. *Ward* v *Stow*, 509

Vide Land charged with the payment of debts, 1, 2, 3. Legacy *passim*. Power 1, 2. Will.

DOWER.

Vide Widow, 1, 2, 3, 4.

DISTRIBUTION.

Vide Executors and Administrators, 4.

EJECTMENT.

Vide Costs, 2.

EMANCIPATION.

A bequest of slaves, for the purpose of emancipation, is void, and a trust results to the next of kin. *Redmond* v *Coffin*, 440

ENTRY.

One who purchases at execution sale, land which has been entered, but not paid for, must, at his peril, complete the title, and if the entry is defective, he has no equity to claim the land of the defendant in the execution, upon a subsequent entry of it by the latter. *Nunn et al.* v *Mulholland*, 381

ESTATE FOR LIFE IN PERSONALTY.

1. A residue which is given for life, with a remainder over, must be sold by the executor, and the interest paid to the legatee for life, and the principal to him in remainder, because this is the only mode of giving both sets of legatees the enjoyment of those chattels which are perishable. *Smith* v *Barham*, 420
2. Slaves are in this State, an exception to this rule, because they are not consumed in the use, and their natural decay is supplied by their issue, which goes to those in remainder. *Ibid.* 420
3. A legatee for life is bound to keep down the interest of a debt charged upon his

legacy, and he may be compelled to contribute to its payment. But he is not bound to surrender the whole profits for the purpose of extinguishing it. *Ibid.* 425

4. The legatee for life of a specific chattel, has a right to the possession of it, and the assent of the executor to his legacy vests the title of him in remainder. *Ibid.* 426

5. When a specific chattel, which is consumed in the use, is given for life, what interest vests in the remainder-man. Qu? *Ibid.* 427

Vide Limitation of Personal Estate.

EVIDENCE.

1. The terms of a written agreement cannot be varied by parol proof, in equity more than at law, unless upon an admission by the defendant, or unless the provision sought to be established was a substantive part of the agreement, and omitted through fraud or mistake, as where an absolute bond was given to indemnify bail, and the proof was of admissions by the obligee of the intent, but nothing to show fraud or mistake, or that a condition was omitted, it was held to be single. *Howell* v *Hooke*, 258

2. A sheriff's return and deed are *prima facie* evidence of the sale and of the identity of the land sold and that conveyed; but if the presumption exists at all in favor of deeds executed by a succeeding sheriff, under the act of 1799 (*Rev. c.* 538) it fails when it appears that the successor knew nothing of the facts recited in his deed, but executed it from his confidence in the representations of the purchaser. *McPherson* v *Hussey*, 323

3. A defendant against whom no decree is prayed, and who has no disqualifying interest, may be examined by the plaintiff. *Jones* v *Bullock*, 369

4. Where a father conveyed land to a son by a deed of bargain and sale, upon a bill by other children, seeking to have the land brought into hotch-pot, parol evidence cannot be received to prove that it was in fact given as an advancement. *Wilkinson* v *Wilkinson*, 376

5. Parol evidence is not admissible, either in equity or at law, to vary the terms of a written contract. *Ibid.* 377

6. But in equity, matter of fraud, accident or surprise, may be proved by parol, to raise a trust *dehors* the deed, and affect the conscience of one claiming under it. *Ibid.* 378

Vide Answer, 1, 8,—Executors and Administrators, 27, 28, 29, 30,—Master's Report, 1, 2,—Mortgage, 16,—Practice, 1, 2, 3,—Receipt.

EXCEPTIONS.

Vide Master's Report, 1, 2. Practice 4.

EXECUTION AND EXECUTION SALES.

1. As many executions, of any kind, as the plaintiff chooses, may be sued out on the same judgment—but if executed wrongfully, or irregularly, it is at his peril. *McNair* v *Ragland*, 42

2. If a *fi. fa.* and *ca. sa.* are both sued out, and there is a levy under the former, the latter cannot be executed until either a sale or due discharge of the effects. *Ibid.* 44

3. *Per* Daniel, J.—The act of 1812, (*Rev. c.* 830,) authorising the sale of trust estates by execution, applies where the trust estate of the defendant is coextensive with the legal title; not where the trustee holds for the defendant for life, with remainder to others. *Freeman et al.* v *Perry*, 245

4. A purchaser at execution sale, succeeds to all the rights of the defendant, and where the latter, before the teste of the execution, had received a deed for land, which by the fraud of a third person, had before its registration been destroyed, and the legal estate conveyed by the bargainor to that person, the purchaser is entitled to a conveyance from him.—*Morris* v *Ford*, 412

5. An unregistered deed vests in the bargainee an inchoate legal estate, which was liable to seizure under an execution, before the passage of the act subjecting equitable interests to execution sales.—*Ibid.* 418

5. Defendants need not answer immaterial allegations. Therefore where a plaintiff

alledged that an execution in favor of the defendants, being in the hands of the Sheriff, he had in satisfaction thereof, discounted with the Sheriff, a judgment which he, the plaintiff, had against him and others, an execution for which was then in the hands of the coroner, and that mutual receipts had passed between him and the sheriff; and further that the Sheriff, not paying over the money to the defendants, they had obtained a judgment therefor, upon the official bond of the Sheriff; it was held, that without the assent of the defendants to the settlement between the plaintiff and sheriff, these facts constitute no defence against the judgment in favor of the defendants, against the plaintiff; and that the defendant need not answer whether the sheriff and others against whom he had the judgment were good and able to pay the same, nor whether an execution on said judgment was in the hands of the coroner, nor whether the plaintiff gave the sheriff a receipt for the judgment, nor whether the sheriff and his sureties were able to pay the judgment on his official bond. *Collier* v *Bank of Newbern*, 525

7. Nothing but cash received by the Sheriff from the defendant in an execution, or a levy upon his property, and taking it out of his possession, can discharge the debt due the plaintiff. *Ibid.* 530

Vide Auction Sales—Creditors 1, 4, 5—Entry—Execution and Execution Sales 38, 39, 40—Mortgage 5, 6, 15.

EXECUTORS AND ADMINISTRATORS.

1. Executors are not entitled to commissions on debts due from themselves to the testator, nor upon payments to legatees.—*Arnold* v *Blackwell*, 4
2. Neither are they allowed to a dishonest executor. *Ibid.* 4
3. A division of slaves, honestly made by an executor, upon a wrong principle, may be set aside upon the bill of a legatee, who has submitted to the division in ignorance of his rights. *Speight* v *Gatling*, 9
4. The children of a second husband cannot enforce distribution from the administratrator of the first; because, if the share of the wife vested in her second husband, his administrator only can claim it; and if it survives to her, the children have no right to it. *Dameron* v *Clay et al.* 19, 20
5. An executor is not liable for *laches* in not enforcing the payment of a debt due the testator, from a co-executor who becomes insolvent after the probate of the will. *Clarke* v *Cotten et al.* 51
6. An executor may retain for necessary expenses, in addition to his commissions at the rate of 5 *per cent.* upon the receipts and disbursements. *Ibid.* 54
7. Commissioners are not allowed upon payments to legatees. *Ibid.* 55
8. An executor is not liable upon the insolvency of a co-executor, for assets which he has never had under his control. *Ibid.* 55
9. Legatees can come into equity to secure themselves against the insolvency of an executor. But it does not follow that an executor can compel an insolvent co-executor to account; and it seems that he cannot. *Ibid.* 56
10. Executors have no right to charge a specific legacy bequeathed to a co-executor, with a debt due from him to the testator. *Ibid.* 57
11. Where one, appointed an executor, purchases at the sale of the assets, before he has proved the will, and his co-executors deliver him his own note and also others, for collection, and the debtor afterwards proves the will and becomes insolvent, the co-executors are liable for the amount of his purchases and collections. *Ibid.* 57
12. But disbursements by the insolvent, in payment of the debts of the testator, made by directions of his co-executors, shall exonerate them *pro tanto*, and not be applied to a debt which he owed the testator in his life-time. *Ibid.* 58
13. Where it becomes necessary for an executor to employ an agent, the appointment of one who was nominated as co-executor, but never proved the will, is justified by the confidence reposed in him by the testator. *Ibid* 58

14. It makes no difference, that the agent may, by proving the will, place it out of the power of his co executors to call him to account. *Ibid.* 59
15. Where one executor delivers over assets to his co-executor *bona fide*, and for a purpose apparently beneficial to the estate, he is not responsible for the conduct of his co-executor. *Ibid.* 59, 60
16. An administrator who has paid debts of his intestate to a larger amount than the assets in his hands, is, in equity, substituted to the rights of the creditors, and may recover of the heir the sum thus overpaid. *Williams* v *Williams*, 69
17. But if an administrator, knowing the personal estate to be insolvent, had made such payments with the intent to make the heir his debtor, and withdraw the question of fully administered from the proper forum, he would be entitled to no relief. *Ibid.* 71
18. A Court of Equity has jurisdiction at the suit of a legatee, against the executor of an executor, who has the funds of the first testator in his hands, although there is a surviving co-executor. *Brotten* v *Bateman*, 115
19. Creditors have no redress against the executor of an executor, where there is a surviving co-executor, unless upon the ground of collusion, or of the insolvency of the survivor. *Ibid.* 117, 118
20. A payment by the executor of one of two co-executors to the survivor, will discharge the estate of the deceased executor, *pro tanto*. *Ibid.* 118
21. Legatees may in equity recover of the executor of a deceased executor, and the surviving co-executor, the funds in their hands respectively. *Ibid.* 118
22. Co-executors who jointly administer are liable for each other's acts. *Ibid.* 118
23. But upon an account of their administration, both are not jointly responsible to legatees in the first instance. He who has received the fund is primarily liable, and the other only in case of his default. *Ibid.* 119
24. The court presumes against an administrator dealing with the estate for his own benefit, or that of a co-administrator; or claiming commissions while he keeps no account. Yet under special circumstances, such dealings may be supported, and commissions allowed. *Finch* v *Ragland*, 137
25. It is not a universal rule, that an administrator who keeps no accounts shall be allowed no commissions. It is however a very general rule, and will only admit of an exception under very peculiar circumstances. *Ibid.* 141
26. An executor who keeps no accounts is chargeable with interest. *Ibid.* 142
27. The production of the intestate's notes by an admistrator is not sufficient proof of a disbursement. *Ibid.* 142
28. It is in itself a suspicious circumstance, that one administrator should confess to another a judgment for a debt claimed from the estate; and no effect will be given to it as a judgment; but the creditor, if alive, must prove the debt. But where such admistrator is dead, and many years have elapsed, so that the means of direct proof no longer exist, and all the circumstances of the case repel the presumption of fraud, the court will allow weight to the judgment as a settlement between the administrators. *Ibid.* 144
29. A judgment against an administrator is in general a sufficient voucher for him, without other proof of the debt.—But a judgment by an administrator against his co-administrator, being a nullity at law, is not allowed by a Court of Equity to have the effect of a judgment. *Ibid.* 146
30. But such judgment is evidence of a settlement between the administrators; and after the lapse of twenty years and the death of the administrator who was a creditor, the court allowed the administrator credit for the judgment, without further evidence of the debt. *Ibid.* 146
31. Although an executor cannot purchase at his own sale, yet if he does, and there is no fraud, but he pays the purchase money for the use of the estate, and his accounts are settled, and acquittances given by the legatees, without the exercise of undue influence on his part

he cannot, after the lapse of twenty-nine years, be declared a trustee for the legatees of the slaves purchased by him.—*Villines* v *Norfleet*, 167

32. A settlement of the account of an executor by commissioners appointed by the County Court, is not a bar to a future account, but it rebuts the presumption of fraud. *Ibid.* 172

33. *It seems*, that an executor who has been charged with assets in respect to a judgment which is enjoined, is entitled to relief; but whether at law or in equity. Qu? *Howell* v *Hooks*, 261

34. An administrator who has, without neglect, been compelled to pay debts of his intestate to an amount exceeding the personal estate, will be re-imbursed out of the real assets. *Sanders* v *Sanders*, 262

35. But if the payment be voluntary, whether he will be aided. Qu? *Ibid.* 262

36. The executor of a will which is of doubtful import, has a right to apply to a Court of Equity to have it construed, and its trusts declared. *Bullock* v *Bullock*, 307

37. An administrator, with the will annexed, becomes a trustee for any trusts declared in the will, as much as if he had been named executor. *Jones* v *Jones*, 387

38. Where an executor raised money and bought the slaves of his testator at execution sale, and re-paying the purchase money, conveyed them according to the terms of the will, *it was held*, DANIEL, J. dissenting, that they were liable to the claims of other creditors. *Clarke* v *Clarke*, 407

39. *Per* RUFFIN, C. J. *arguendo*.—The same objections apply to purchases made by an executor at execution sale of the assets, as to those made at his own.—*Ibid.* 410

40. By DANIEL, J. *arguendo*.—A levy vests the title to chattels in the sheriff. His sales are *prima facie* fair, and the case of *Blount* v *Davis* (2 *Dev. Rep.* 19) validate purchases of assets made by the executor at his sales. *Ibid.* 411, 412

41. Although executors who *bona fide* pay a legacy to a charity of doubtful validity are protected, yet when slaves were bequeathed to a Quaker Society, upon a trust for emancipation, and the executors confederating with the Society to defeat the claim of the next of kin, delivered the slaves to the Society, and otherwise acted *mala fide*, they, in default of payment by the Society, were held responsible for their value and hire, and also for interest thereon. *Redmond* v *Coffin*, 452

42. No decree can be made against an executor, unless assets are admitted by him, or found upon a reference: and where he is made a defendant by *scire facias*, after establishing the right of the plaintiff, the proper step is to direct an enquiry as to assets. *Mitchell* v *Robards*, 478

43. Executors charged with the management of legacies to infants, are entitled to commissions upon the profits—but they take them *as executors*, to be divided according to their several degrees of labor; and upon the death of one who had possession of the fund, the survivor is not entitled to another commission.—*Perry* v *Maxwell*, 506

Vide Account, Decree, Evidence, Interest, 3,—Jurisdiction, 1,—Legacy, 48, —Master's Report, 2,—Reference to the Clerk and Master, 1,—Residue and Residuary Clause, 2,—Surety, 4,—Vendor and Purchaser, 6.

EXCHANGE.

Where A sold land to B, for $5,100, with a permission to make a payment of $1,500 by a conveyance of two tracts of land in Tennessee, which should be of the value of three dollars per acre according to the locator's valuation; upon a bill by A, claiming the $1,500 in cash, it was held, to be an executory agreement for an exchange of land, and that the default of B, in making the conveyance, and the want of a locator's valuation were matters of compensation.—*Littlejohn* v *Islar*, 302

FEME COVERT.

In suits by married women, a *prochein amy* is necessary, not only to secure the costs,

but when her husband is a defendant, to interpose a suitable adviser; and this rule is not dispensed with, even where the wife sues *in forma pauperis* — *Ward* v *Ward et al.* 553

Vide Costs 1.

FORGERY.

Vide Practice 5.

FRAUD.

1. A wrong done by a person seeking equitable relief, to one not a party to the proceedings, furnishes no objection to such relief on the part of those against whom it is sought. *Goode* v *Hawkins*, 393
2. When an objection to equitable relief is based upon an allegation of *fraud*, it will not be sustained by proof of mere *error*. *Ibid.* 393
3. No one can in equity, be permitted to set up a benefit derived through the fraud of another, although he may not have had a personal agency in the imposition. *Ibid.* 397

Vide Evidence 1, 6—Execution and Execution Sales, 4—Executors and Administrators 41.

GIFT OF SLAVES.

1. Before the act of 1806 (*Rev. c.* 701) if a father, upon the marriage of a child, put negroes into her possession, *prima facie* it is a gift, and not a loan. *Dameron* v *Clay*, 19
2. A parol gift of slaves is not entirely void by the act of 1806, (*Rev. c.* 701.) The death of the donor, or a confirmation of it by him, renders it good *ab initio*. *Bullock* v *Bullock*, 314
3. A gift unaccompanied with delivery, and by an instrument not sealed, is not valid; and where a testator bequeathed a slave to his widow for life, and afterwards to all his children, and while the slave was in the possession of the widow, some of the children relinquished, without consideration, and by a writing not under seal, their interest in the slave to one of their brothers, it was held that the instrument passed nothing. *Downey* v *Smith*, 535

GUARANTY.

The arrest of a debtor, upon final process, is not necessary to enable a guarantee of the debt, to charge the guarantor.—*Blackledge* v *Nelson*, 65

GUARDIAN AND WARD.

Vide Interest, 2.

HEIRS.

The heir is concluded by a judgment against the administrator, as to every thing but the amount of assets received by the latter. *Sanders* v *Sanders*, 264

Vide Accord and Satisfaction,—Legacy, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24,—Vendor and Purchaser, 11.

HOTCH POT.

Vide Evidence, 4.

HUSBAND AND WIFE.

1. In this State the wife has no equity against her husband to have a provision made for her out of her *choses* accruing during the coverture, although he be insolvent, and no settlement has been made on her. *Lassiter* v *Dawson*, 383
2. A deed to a *feme covert*, conveying slaves to her after the death of the donor, creates an interest which survives to her after the death of her husband, and she is a necessary party to a bill by him, seeking relief upon her title. *Kernegay* v *Carroway*, 405
3. The words "to her and her heirs' proper use," annexed to a legacy to a married daughter, do not make it a legacy to her separate use, being probably an ineffectual attempt to secure it to her children, and not intended to defeat the right of her husband, and the fact that the testator uses different words in legacies to his sons, is not sufficient to rebut this presumption, and repel the claims of the husband. *Rudisell* v *Watson*, 430

Vide Feme Covert.—Parties to a Suit, 1, —Vendor and Purchaser, 3, 4.

IN FORMA PAUPERIS.

Vide Feme Covert.

INJUNCTIONS.

1. Where the right affected is clear, or the injury irreparable, injunctions are granted against private nuisances, originating in establishments for personal gratification, or private profit only. *Eason* v *Perkins*, 40

2. But private right must, upon adequate compensation, yield to public convenience; and courts of equity will not interfere by injunction, where the public benefits resulting from such an establishment exceed the private inconvenience. *Ibid.* 40

3. A court of equity will not enjoin a suit at law in the court of another State; neither will it direct a particular order to be made in a chancery suit thus pending, unless it be by putting a party to his election. *Boyd* v *Hawkins*, 336

Vide Judgment 6—Mills 1, 2.

INTEREST.

1. Interest upon rents and profits is not usually allowed until an account be demanded. But where the possession is *mala fide*, it is allowed from the receipt. *Benzein* v *Robinet*, 67

2. Interest is not compounded against a guardian for the time when the funds of the ward remain in his hands after the relation has ceased. *Mitchell* v *Robards*, 479

3. An executor will not be charged interest on a small sum, too inconsiderable for distribution, which he *bona fide* keeps on hand for a general settlement. Nor will he be charged interest on a large sum, received after the filing of a bill for an account, when he makes no opposition to the account, and retains the money to answer the decree. But if an order is made in the cause, authorising him to pay the money into court, and he neglects to do so, he will be charged with interest upon it from the time the order was made. *Downey* v Smith, 535

Vide Estate for life in personalty, 3—Executors and Administrators, 26, 41—Legacy 36, 47.

INTERPLEADER, BILL OF.

Vide Jurisdiction 4.

ISSUE.

Vide Answer 5, 6, 7—Practice 5.

JUDGMENT.

1. The irregularity of a judgment at law is no ground of relief in equity. To entitle himself to relief, the defendant at law must show that advantage was taken of him, to preclude him from a defence against an unconscientious claim. *Bissell* v *Bozman*, 154

2. If a judgment has been iniquitously used, a Court of Equity will annul what has been done under it. *Ibid.* 161

3. Where there is a confidential relation between the plaintiff and defendant at law, a Court of Equity will set aside a judgment by default, unless some proof was offered. *Ibid.* 162

4. Where a judgment was confessed to the prosecutor by a prisoner confined in jail on a charge of larceny and arson, under circumstances which induced the court to enjoin it, but without any misconduct on the part of the prosecutor, it was held, that it should stand as a security for the amount which might be recovered in another action to be brought by the prosecutor for the same trespass. *Heath* v *Cobb*, 187

5. A defendant at law has no relief in equity against a void judgment; as where no *sci. fa.* was served on the heir, and the creditor obtained a judgment and purchased his land, the judgment being void, and the remedy at law complete, no relief can be had in equity. *Armsworthy* v [illegible], 224

6. A defendant whose judgment has, pending a suit in equity, become dormant, is not, upon a dismission of the bill, entitled to a decree for his debt, unless an injunction has issued. *Howell* v *Hooks*, 261, 262

Vide Executors and Administrators, 28, 29, 30, 33,—Lapse of Time, 1, 4, 7, 8, 9.

JURISDICTION.

1. Upon a bill by children against the administrator of their father, harging that negroes had been advanced, upon the marriage to their mother, and vested in her husband, and that after the death of their father, the negroes were claimed by the brothers and sisters of the mother, as having been a loan, and not an advancement—there being no collusion between the administrator and the plaintiffs, and the former being in possession, and honestly defending his legal title—

it was held that the court had jurisdiction to decree a distribution of the slaves by the administrator, but not to try the controversy between the latter and those claiming a legal title adversely to him. *Dameron* v *Clay et al.* 17

2. A court of equity has a clear jurisdiction on the bill of the *cestui qui trust*, against the trustee. *Ibid.* 20

3. But where a third person claims a legal title adversely to the trustee, a bill by the *cestui que trust* against the trustee and that third person, drawing the question of title into litigation in equity, cannot be maintained. *Ibid.* 20

4. It cannot be sustained as a bill of interpleader, because the plaintiffs are not in possession. *Ibid.* 21

5. And *it seems* that the trustee cannot to protect himself, draw the *cestui que trust*, and a stranger into litigation.—*Ibid.* 21

6. Nor can one in possession under a legal title, sue one out of possession, to have a pretended title of the latter declared void, unless upon some peculiar ground of equity jurisdiction. *Ibid.* 21

7. Courts of equity in this State will not sustain a bill to enjoin a judgment at law, upon a money demand, where the amount in controversy does not exceed fifty dollars. *Chunn* v *McCarson*, 73

Vide Account 3, 4.—Executors and Administrators 18.

LAND CHARGED WITH THE PAYMENT OF DEBTS.

1. The rule exempting lands charged with the payment of debts, until the personal estate is exhausted, is not founded upon the notion of the testator's providing a fund not otherwise chargeable; but upon his presumed intent that his gift shall not fail while there is a surplus not given away. *Palmer* v *Armstrong*, 269, 270

2. Or to distinguish between different devisees, and not between them and the heir or next of kin. *Ibid.* 270

3. The rule is the same when there is a conversion out and out, and the residue given away. *Ibid.* 271

Vide Legacy, 19, 20, 21, 22, 23, 24, 28, 35, 37.

LAPSE OF TIME.

1. Where a judgment on a bond was obtained, and after a return of not satisfied, became dormant, and ten years afterwards was revived, when the defendant having discovered evidence that the bond had been paid, obtained a verdict establishing that fact, upon an issue directed for the purpose, it was held, Ruffin, Judge, *dissentiente*, that as the evidence was satisfactory to a jury, the lapse of time was not a bar to the relief. *Hill* v *Jones*, 101

2. *Per* Ruffin, Judge. A Court of Equity requires active diligence, as well as a just cause, because of the difficulty of ascertaining the truth in State cases.—*Ibid.* 104

3. The rule prescribes no particular time; but where the s atute of limitations bars at law, it bars also in equity. *Ibid.* 105

4. Where the relief is sought against a judgment at law, to let in a legal defence unknown at the trial, the bill should be filed with the least possible delay. *Ibid.* 105

5. This in analogy to the rule of law on applications for continuances for newly discovered testimony. *Ibid.* 106

6. And also where a verdict is sought to be set aside by appeal or *certiorari*.—*Ibid.* 106

7. At any rate the plaintiff should be held, in analogy to the act of 1800 (*Rev. c.* 551) prohibiting the granting of injunctions upon judgments obtained at law, more than four months after the trial to file his bill within that time after the discovery of the evidence. *Ibid.* 106

8. A judgment ought not to be set aside for testimony discovered after the time allowed the defendant to bring error.—*Ibid.* 108

9. Much more ought a bill to set aside a judgment for after discovered testimony, to be dismissed, where if it sought to reverse a decree, it would be barred by lapse of time. *Ibid.* 108

10. A delay of thirty-four years after a contract for the sale of land, without any claim on it, is a bar to a bill for its specific performance, where the delay is not

accounted for by reason of infancy, coverture, or the like. *Tate* v *Conner*, 224

11. In an agreement for the sale of land, the vendor is considered to be a trustee for the vendee, and the statute of limitations does not, in equity, bar the latter. But that court respects the lapse of time in cases of implied trusts, and unless explained, it is a bar to the relief. *Ibid.* 226

LEGACY.

1. Where a testator bequeathed personal estate to a child, "to her and her heirs forever," and added "it is my will and desire that if my said child lives to arrive at the age of eighteen years, for her to receive said legacy and take possession of it; and if she should die without a lawful heir begotten of her body, then the said property to revert back and be equally divided," &c.—it was held that the words "receive and take possession" were equivalent to "shall then be paid," and that the legatee took a vested and (the limitation over being too remote,) an absolute interest. *Cooper* v *Pridgeon*, 98

2. Where the time is not annexed to the legacy, but to the payment of it, the legatee takes a vested interest. *Ibid.* 99

3. Where a testator, having expressed his determination to disinherit one of his children, bequeathed as follows: "my negroes I wish divided equally among my wife, L, N, and D, (his other children) and in case of the death of either, that their share shall be equally divided among the survivors, it was held by HALL, Judge, that the words of survivorship were used solely to effect the testator's purpose of disinheriting one of his children, and that upon his death, the estate vested in the survivors of L, N, and D, and was only divested upon their death without issue, when the share of the child so dying went to the survivors. But by RUFFIN, Judge, held, that the words of survivorship were used only to prevent a lapse; and that at the death of the testator, the estate vested absolutely in the survivors, and upon the death of either without issue, his share went to the next of kin. *Cox et al.* v *Hogg et al.* 121

4. In a bequest to A, and "in case of his death," or "if he happen to die," to B, A is held, according to the circumstances of each case, to take for life, or to take absolutely, and B is only to be substituted in case of a lapse. *Ibid.* 127

5. If A survives the testator, B takes upon the death of A, unless a benefit to A's issue is intended, or unless by the bequest he is to have the principal as well as the profits. *Ibid.* 128

6. Much more is this the case when B is a stranger. *Ibid.* 128

7. Where the share of each legatee was to be determined at the death of the testator, and a division to be made, and there was no trust and direction to pay over the profits, especially where the legacy was of a residue, these are circumstances indicating that words of survivorship are to be restrained to the death of the testator. *Ibid.* 128

8. An express estate in common is not cut down to a joint tenancy by words of survivorship; and they are held to be inserted for the purpose of preventing a lapse. *Ibid.* 128, 129

9. Where a general survivorship is created in a residuary clause, what sort of survivorship is intended, may be ascertained from other parts of the will. *Ibid.* 129

10. A clause of survivorship superadded to words which in a will create a tenancy in common, is held to be inserted for the purpose of preventing a lapse, unless a contrary intention is apparent. Because a different construction would cut off the issue of the legatee. *Ibid.* 131, 132

11. For the same reason a devise to A, but if he die before twenty-one *or* without issue, is construed to mean if he die before twenty-one *and* without issue. *Ibid.* 132

12. But where the issue of the legatee are not injured by a natural construction, it is adopted. *Ibid.* 133

13. Where a testator in his lifetime subscribed for stock in the Roanoke Navigation Company, and died without completing the payments, and by his will

gave specific legacies and created a fund for the payment of his debts, it was held, the fund for the payment of debts and the undisposed of residue being exhausted, that the stock in the hands of the heir should be subjected to the payment of the balance due upon the subscription in exoneration of a specific legacy. *Robards v Wortham*, 173

14. Descended lands must exonerate a specific legatee from the payment of all debts, for which the heir is bound.—*Ibid.* 175

15. The devisor cannot restrain the creditor from subjecting the personal estate; but where the latter has a right to resort to both the personal and real assets and exhausts the former, a legatee will be substituted to the rights of the creditor against the heir. *Ibid.* 176

16. If the heir pay the specialty debt of the ancestor, he may indemnify himself out of the residue of the personal property. But the legatee cannot be indemnified out of the real estate, unless the debt paid by his legacy be a charge upon the heir. *Ibid.* 176

17. And a subscription to the stock of the Navigation Company being a simple contract debt, the legatee on payment of it, has no right to indemnity from the real estate. *Ibid.* 176

18. But the subscription creating a specific lien, and being the ancestor's debt, the heir has a right to an indemnity from the residue, and a specific legatee from the real estate. *Ibid.* 177

19. Where land is devised to be sold for the payment of debts, and the surplus given away as cash, it is primarily liable, even between the heir and the residuary legatee. *Ibid.* 177

20. But where land is charged with the debts, it is taken as only auxiliary to the personal estate, unless the contrary clearly appears to have been the intention of the testator. *Ibid.* 177

21. Real assets in the hands of the heir, as well as personal estate are the primary funds for the payment of specialty creditors and specific liens; and by specially bequeathing the personal estate, the testator declares his intention that the land shall bear its own burden. *Ibid.* 179

22. So by a devise of the land, the testator declares his intention to exempt it, and hence a devise to the heir prevents the land from being subjected in exoneration of the specific legacies. *Ibid.* 179

23. It is a question of intent; but to change the order of liability requires a clear expression to that effect. *Ibid.* 179

24. And where the testator devised land to be sold for the payment of debts, and gave the surplus to his wife, and also gave her a large legacy and small legacies to others, and directed his executors in case of a deficiency of the fund for the payment of debts to sell such property as his wife might point out, *it was held* that this direction charged the wife's legacy as between her and the other legatees, but did not exonerate descended real estate. *Ibid.* 179–180

25. Where a testator directed the interest of one third of the valuation of his slaves to be paid to his son, and requested another son to take the slaves, and pay the valuation to his executors, and appointed that son & another his executors: Held, upon the probate of the will by the son alone, and upon his electing to take the negroes under the will, that he might retain the value of the negroes, and that they were not bound as a security for the annuity. *Wilson v Wilson.* 181

26. Bequest of negroes, to be divided between the children of A, when one of them arrives at the age of sixteen; held, that children born after the death of the testator, but before the time of the division, are entitled to a share. *Fleetwood v Fleetwood*, 223

27. A legacy to a class of persons, without any time fixed for its division, *is to* be divided among the legatees in *esse*, at the testator's death. *Ibid.* 223

28. A testator gave lands and goods to his executors to be sold, "and after payment of all my just debts, the residue of the moneys arising from them, to" &c. The words "after payment," &c. subject the land in exoneration of other legacies, but not in favor of the next of

kin. *Palmer* v *Armstrong*, 268
29. A pecuniary legacy charged with the debt of the testator, is to be reimbursed out of the residuum, as well when that is undisposed of, as when it is given away. *Ibid.* 271
30. A legacy, where the legatee is not described so as to take, sinks into the residue; but one given by a description which applies to several, goes to the sovereign as direlict. *Clarke* v *Cotten et al.* 301
31. A legacy to a daughter of "the negroes I placed in her possession at her marriage," passes the increase, as well as the original stock. *Bullock* v *Bullock*, 314
32. A legacy of stock in trade, and all purchases made therewith, gives the legatee the profits thereon. *Ibid.* 315
33. A legacy to the heirs of a living person is to be construed as to his children, if it appears upon the will that he is living. *Ibid.* 316
34. And in that case, after-born children take under the words heirs proceeding from his body. *Ibid.* 316
35. A direction to sell specific property, "and the money thence arising to be disposed of" in the payment of debts and legacies, makes the latter a charge upon the sales. *Fraser* v *Alexander*, 352
36. A legacy to a grandchild, "when she comes of age," and "if she dies before she arrives at lawful age or marries," then over, is contingent, and vests only upon her arrival at full age or marriage. But the payment is postponed until she comes of age, and interest accrues only from that time. *Kent* v *Watson*, 366
37. A legacy "to be paid out of my estate," is charged by those words upon the land which passed by the will, especially when the personalty is very small, and was all given to the wife for life, and she appointed executrix. *Bray* v *Lamb*, 372
38. A bequest of "all the notes of hand, that will be remaining after paying off all the legacies herein-before given, which I suppose will be from twenty to thirty thousand dollars," is specific, and the legacy is to be applied to the payment of the general legacies, only in the event of the undisposed of residue being insufficient for their discharge. *Perry* v *Maxwell*, 488
39. Dividends upon stock due at the death of the testator, do not pass by a bequest of the stock itself. *Ibid.* 495
40. A legacy by a debtor to his creditor, of the same nature with the debt, and of an equal or greater value is *prima facie* a payment of it. *Ibid.* 498
41. But the adoption of this rule has been regretted, and there are many circumstances which repel the presumption.—As a general direction for the payment of debts, or if the legacy be contingent, or payable after the debt, or be specific or uncertain, or given after the debt is contracted. Especially is it repelled, where the debt is contingent. *Ibid.* 498-499
42. And where at the date of his will the testator was an administrator, and upon his death without settling his administration, bound to account with an administrator, *de bonis non*, legacies given by him to the next of kin of his intestate, are not payments of their distributive shares. *Ibid.* 501
43. A legacy "in notes to be taken out of my notes, and handed over," &c. is not merely a charge for its amount upon the notes of which the testator may be possessed, but is a specific legacy of securities hereafter to be ascertained. *Ibid.* 501
44. But one to be paid as soon as its amount can be collected, or if the "legatee is willing to receive that in good notes, he can do so," is a general legacy. *Ibid.* 503
45. So also, is a legacy "in notes to be paid as soon after my death, &c." there being nothing to denote that any particular notes were intended. *Ibid.* 504
46. And a subsequent bequest of "all the notes that will be remaining after paying off the legacies herein before given," will not make them specific, because the remainder being uncertain in amount, indicates that the charge upon them, and not a fractional part of them, was intend-

ed. *Ibid.* 505
47. A gift by will, of a note, carries with it the interest due on it. *Ibid.* 507
48. A legacy to A, *when* he shall attain twenty-one, does not vest before that time, and a payment to his guardian during his infancy, does not protect the executor. *Giles* v *Franks*, 521
Vide Devise, *passim*,—Estate for Life in Personalty, *passim*,—Executors and Administrators, 3, 18, 21, 23, 41, 43,—Husband and Wife, 3,—Residue and Residuary Clause, 1, 2,—Tenant in Common, 2,—Will, *passim*.

LIMITATIONS OF PERSONAL ESTATE.

In remote limitations of personal estate, the first taker is not to secure the forthcoming of the property to answer the ulterior limitations, unless he be insolvent. *Bullock* v *Bullock*, 321

LIMITATIONS, STATUTE OF.

Vide Lapse of Time, 3, 7, 11,—Tenant in Common, 1,—Trust, 17.

MASTER OF A SHIP.

1. For the benefit of trade, the captain of a ship is liable for disbursements in a strange port; but if he consigns to the person making them, property of the owner sufficient to cover them, the consignee, by paying the funds in his hands to the owner, without deducting the disbursements, discharges him. *Bissell* v *Bozman*, 229
2. The captain is liable as the surety of the owner, and has, as to him, all the rights of one. *Ibid.* 232
3. The captain, when discharged from liability to the consignee, cannot affect the relations subsisting between him and the owner; neither by a subsequent payment to the former, can he make the latter his own debtor. *Ibid.* 232

MASTER'S REPORT.

1. If a written statement, not on oath, of matters relevant to an enquiry before the master, be received and acted upon by him, the admissibility of such statement cannot be made the ground of exception to his report, unless the objection was taken before the master. *Aliter* where the master receives a written statement of matters, which if sworn to, would not have been admissible, because irrelevant without the production of a judgment or other record. *Finch* v *Ragland*, 137
2. Written receipts for money of living persons are not strictly legal evidence of disbursements by an administrator, especially where the money paid is due by account. But if such receipts be received and acted on by the master, without objection made before him, the exception cannot afterwards be taken.—*Ibid.* 138

MILLS.

1. Where the owner of land adjoining an old mill site, sought to enjoin the erection of a new mill, and it was ascertained by a verdict, that the mill, though injurious to the health of the plaintiff's family, was advantageous to the public, relief was refused, especially as the old mill was erected before the plaintiff purchased. *Eason* v *Perkins*, 38
2. The erection of mills, where they are not nuisances, being authorised by law, a Court of Equity will not restrain the erection of one, simply because it affects the health of one family. *Ibid.* 41

MISTAKE.

Where a deed describes the land conveyed by metes and bounds and by mutual mistake of the parties, covers land which the vendor did not intend to sell, nor the vendee to buy, the mistake will be corrected. *Pugh* v *Brittain*, 34

MORTGAGE.

1. Upon a bill of foreclosure, a sale of the mortgaged premises is directed. *Blackledge* v *Nelson*, 66
2. Where a part of the mortgaged premises was sold by the mortgagor subsequent to the mortgage, a sale of the residue of the land will be ordered in the first instance, for the payment of the mortgage debt. *Ibid.* 66
3. Where the bill alledges a transaction to be loan and a mortgage, and seeks a foreclosure, the plaintiff cannot at the hearing ask relief, as upon a conditional sale. *McBrayer* v *Roberts*, 78
4. On the enquiry whether a conveyance

of slaves be a mortgage or a conditional sale, the fact that no bond is taken to secure the money advanced, is only one evidence of the character of the transaction. *Ibid.* 78

5. If the mortgagee obtains a judgment and execution for the mortgage debt, and under the act of 1812, (*Rev. c.* 830,) sells the equity of redemption, and becomes the purchaser, how is the relation between him and the mortgagor affected thereby. Qu. *Bissell* v *Bozman*, 165

6. But where a mortgagee purchased at a sheriff's sale, and filed a bill to have his title confirmed, held that he thereby consented to open the estate to redemption. *Ibid.* 166

7. If after foreclosure, the mortgagee in any other way treats the debt as still due, the account will be opened. *Ibid.* 166

8. A mortgagee who sells without a foreclosure is responsible for the value of the property sold. *Bissell* v *Bozman*, 234

9. A memorandum given by the bargainee at the time of receiving an absolute deed, whereby he stipulated that if the land was sold within two years, he would refund to the bargainor the excess received over the purchase money and interest, together with the costs of repair, unexplained, and without evidence to the contrary, makes the deed a mortgage. *Gillis* v *Martin*, 470

10. An agreement at the execution of a mortgage, that in default of the debtor it should become absolute, is never a bar to redemption. *Ibid.* 475

11. A mortgagee in possession is entitled to the costs of repairs and interest thereon. *Ibid.* 475

12. But generally it is otherwise as to improvements, because by allowing for their cost, the difficulty of redemption is increased. *Ibid.* 475

13. But where the mortgagee, thinking himself to be the owner, *bona fide* makes improvements which exhaust the rent, he is allowed for their cost. *Ibid.* 475

14. Upon a bill for redemption, a sale is never ordered, unless by consent. It is otherwise when a foreclosure is sought. *Ibid.* 477

15. A mortgagee who purchases the mortgaged premises at sheriff's sale, upon a parol agreement to hold them as a security, is, in equity, a mere incumbrancer, and parol evidence of the agreement may be received, notwithstanding the sheriff's deed be absolute. *Jackson* v *Blount*, 555

16. Facts and circumstances *dehors* an absolute deed, may, in equity, be proved to show that it was executed merely as a security. *Ibid.* 557

17. An absolute deed declared to be subject to a *proviso* for redemption, upon proof that the vendor was an ignorant and impoverished man—was the father-in-law of the vendee—had been in treaty with the latter to raise money upon loan—that the purchase was an unequal one—and was the balance which the vendor owed for the same land—together with the fact that he occupied the land for twenty-four years without paying rent—and other attendant circumstances.—*Kimbrough* v *Smith*, 558

18. Absolute deeds taken from embarrassed men after a treaty for a loan, are viewed with distrust by Courts of Equity. *Ibid.* 563

Vide Usury.

MULTIFARIOUS.

Vide Bill.

NUISANCES.

Vide Injunction, 1, 2.

PAROL EVIDENCE.

Vide Evidence, 1, 4, 5, 6.

PARTIES TO A SUIT.

1. The wife is an unnecessary party to a bill to set aside a deed for her land, fraudulently procured from her husband alone. *Brownrigg* v *Pratt*, 48

2. Arbitrators, officers of corporations, and solicitors, who have aided their clients to commit frauds, may be made defendants. But the rule is different as to a mere witness, who has no interest in the cause, and against whom no relief can be given. If he answers, the bill, at the hearing, will be dismissed as to

him with costs. *Reeves* v *Adams et al.* 192

Vide Husband and Wife, 2,—Partnership 1, 8, 9.

PARTNERSHIP.

1. All the members of a partnership are necessary parties to a final settlement of the partnership accounts; and if after such settlement one leaves his share in the hands of the acting partner, he does so at his own risk. But if pending an account, and before its settlement, one of the partners receives his share of the profits without the consent of the others, upon the insolvency of the acting partner, he must account with the others for the amount thus received. *Allison* v *Davidson*, 79
2. After the dissolution of a partnership, each partner is a trustee for the others, as to the partnership funds in his hands. But if one of them pays over to the acting partner the partnership effects, unless *mala fides* be proved, he is not liable upon the insolvency of the latter. *Ibid.* 84
3. If several partners conspire to defraud their copartner out of his share of the profits, and act with a view to that purpose, it seems that each is liable for the balance due such copartner, on an adjustment of the partnership accounts.—*Ibid.* 86
4. A partner who has received none of the profits, must first exhaust the partnership effects existing in specie, before he can compel contribution from a partner who has received his share. *Ibid.* 87
5. Where of four partners, one died insolvent, largely indebted to the partnership, and two others, without the consent of the fourth, received their shares from his executor, the sum so received, remains as between the survivor's joint stock. *Ibid.* 87
6. When an acting partner dies insolvent, having appointed one of his copartner's executor, who retains his profits as a debt due from the testator, he is bound to account with the other partners for the sum retained. *Ibid.* 88
7. Where an acting partner takes bonds payable to himself, for partnership debts, and dies, in equity these bonds are copartnership effects. *Ibid.* 89
8. An assignment by one of two copartners, of his interest in the copartnership, is a dissolution of it, because the other is not bound to receive the assignee as a partner. But where the assignment was a mere security, and it was agreed by all parties that the assignor should act in the partnership business as agent of the assignee, it does not produce this effect. And upon a bill by the assignor for an account of the partnership, the assignee and the other partner, are proper parties. *Bufort* v *Neely*, 481
9. The principal debtor is not a necessary party to a bill to settle a copartnership, where the plaintiff has assigned his interest in it to indemnify the surety.—*Ibid.* 485
10. A sale of the joint effects in lots, made by one partner, and a purchase by him, does not divest the property of the other, and the latter is entitled to an account of the profits thereof. *Ibid.* 486

Vide Costs, 4.—Trust 27.

PLEADING.

1. Where a deed is pleaded, or only stated in the answer, as a bar to the relief without having been mentioned in the bill, the replication puts only its execution in issue, and it cannot be impeached by proof of collateral facts. *Boyd* v *Hawkins*, 215, 216
2. But it is otherwise where the deed, with all its attending circumstances, is set forth in the answer, and is made the foundation of a charge against the plaintiff. *Ibid.* 216
3. At the hearing, a deed thus brought forward is not decreed to be cancelled, because relief of that kind is not sought, not because it was not in issue. *Ibid.* 217
4. A plea of the act of 1819 (*Rev. c.* 1016) avoiding parol contracts for the sale of land, is bad where the plaintiff does not pray a specific performance, but treats the contract as a nullity, and seeks other relief. *Clancy* v *Craine*, 383
5. A demurrer is bad, which does not spe-

cify the parts of the bill to which it is intended to apply. More especially is it bad, when it is expressed to be "to the residue of the bill not pleaded to," when in fact the plea applies to the bill. *Ibid.* 363

Vide Release.

POWER.

1. Where a testator directed his land to be sold, and the proceeds divided among his children, the power being apparently executed, and the purchase money paid to the children, they will not be permitted to recover in ejectment, because the will was not proved so as to pass the land.—*Sanderlin v Thompson*, 539
2. But if the purchaser, after the filing of his bill for relief, procures the will to be proved, and charges this fact by a supplemental bill, he thereby overrules his original equity; because having established a legal title in himself, he defeats the jurisdiction of the court. *Ibid.* 539
3. There is no equity in favor of the grantee of a power, nor of a purchaser under him, against the heir, to supply a defect in the creation of the power. But it is otherwise as to the purchaser, upon a defective execution of it. *Ibid.* 545

PRACTICE.

1. Proofs which are not material to any issue between the parties cannot be read upon the hearing. *Brownrigg* v *Pratt*, 49
2. Where the answer sets up a release as a defence to the matter stated in the bill, and the plaintiff replies generally, he cannot at the hearing read testimony impeaching the release as fraudulent—*Wilson v Wilson*, 186
3. No interrogatories can be put to witnesses, which do not relate to some fact in issue between the parties; and testimony as to facts not stated in the bill or answer is to be rejected. *Ibid.* 186
4. A party having filed exceptions, will not be permitted to extend them, unless originally prevented from completing them by accident or surprise. *Potts* v *Trotter*, 283
5. Upon a bill to set aside a deed as a forgery, the deed being in the custody of the court, and no doubt being entertained of its being forged, yet as the fact was more properly triable at law, an issue was ordered at the election of the defendant. *Cooper* v *Cooper*, 298
6. As a plaintiff may in this State dismiss his bill without prejudice, the order for hearing, will upon his application, be set aside upon the terms of his paying all the costs, without being reimbursed them in any event. *Springs* v *Wilson*, 385
7. Upon a bill by the next of kin, if his character does not conclusively appear, a reference as to that fact will be directed. *Redmond* v *Coffin*, 448

Vide Answer 2.

PRINCIPAL AND ATTORNEY.

An attorney must act in the name of his principal, and a deed executed by him in his own name, and as his proper act, does not bind the principal. *Redmond* v *Coffin*, 441

RECEIPT.

A receipt not under seal, is only evidence of satisfaction and may be explained by parol testimony. *Chunn* v *McCarson*, 74

REFERENCE TO THE CLERK AND MASTER.

1. Upon a reference of an executor's account to the clerk, he has power to determine whether a slave was the property of the testator or the executor. *Arnold* v *Blackwell*, 1
2. A master cannot act upon facts within his own knowledge. *Bissell* v *Bozman*, 234

Vide Costs, 3,—Practice, 7.

RELEASE.

An instrument, in its terms a release, but not under seal, cannot be pleaded as a bar. *Redmond* v *Coffin*, 441

Vide Practice, 2,

RELIEF.

1. If the specific relief prayed cannot be given, proper relief may be had under the general prayer, but this relief must be consistent with the frame of the bill: and where the plaintiff claimed slaves as absolute owner, and upon the proofs it appeared that he was entitled in re-

mainder, after an interest for life of the defendant, the plaintiff cannot abandon his prayer for relief as owner, and obtain security as a remainderman.—*Kornegay* v *Carroway*, 403

2. One who has the legal title cannot maintain a bill to have an equitable claim upon his estate declared unfounded. *Sanderlin* v *Thompson*, 546

RENTS AND PROFITS.

Vide Interest, 1.

RESIDUE AND RESIDUARY CLAUSE.

1. A testator is presumed not to die intestate as to any part of his estate; and hence, where there is a residuary clause, all his property not specifically bequeathed, passes under it. *Speight* v *Gatling*, 5

2. A bequest of the residue "to be disposed of as my executors think proper," is a gift to them for their own use, and since the act of 1789 (*Rev. c.* 308,) making executors trustees of the residue, it is a question of construction, and parol evidence is not admissible to prove the next of kin entitled. *Ralston* v *Telfair*, 255

Vide Estate for Life in Personalty, 1,—Legacy, 29, 30, 38.

SET-OFF.

1. Promissory notes executed by the plaintiff, and payable to persons not parties, cannot be set-off against the amount reported in his favor. *Benzein* v *Robinett*, 69

2. If payable to a defendant, and the plaintiff is insolvent, they may be set-off upon petition. *Ibid.* 69

3. But if not payable to a party, it can only be done by a bill. *Ibid.* 69

4. Mutual debts only can be set-off in equity as well as at law; and where A, as administrator, had a judgment against B, who had in C's name, recovered one against A, in his own right, and being insolvent, had assigned it to a creditor, A cannot have the latter judgment applied in satisfaction of the former. *Sellers* v *Bryan et al.* 358

5. In equity, a debt due husband and wife cannot be set-off against one due by the husband alone *Ibid.* 361

SHERIFF'S RETURN AND DEED.

Vide Evidence, 2.

SLAVES.

Vide Emancipation,—Estate for Life in Personalty, 2,—Gift of Slaves, 1, 2, 3.

SPECIFIC EXECUTION.

A contract fairly made, but under a misapprehension of its terms, and of the price, will not be specifically executed, unless the defendant by his subsequent act, has ratified it, and thereby made it unconscientious in him to refuse its fulfilment. *Arnold* v *Arnold*, 467

STATUTES COMMENTED UPON, OR REFERRED TO.

1715, Rev. c. 2, § 5, Wagstaff v Smith, 264
1741, Rev. c. 28, McBrayer v Roberts, 75
1777, Rev. c. 122, Eason v Perkins, 38
1784, Rev. c. 204, Craven v Craven, 338
1789, Rev. c. 308, Ralston v Telfair, 255
1791, Rev. c. 351, Craven v Craven, 338
1799, Rev. c. 536, Clarke v Blount, 51
" " " " Boyd v Hawkins, 334
1799, Rev. c. 538, McPherson v Hussey, 323
1800, Rev. c. 551, Hill v Jones, 108
1806, Rev. c. 702, Dameron v Clay, 17
" " " " Bullock v Bullock, 314
1808, Rev. c. 759, Nunn v Mullett, 383
1812, Rev. c. 830, Morris v Ford, 418
1817, Rev. c. 959b Robards v Wortham, 193
1818, Rev. c. 962, Pike v Armstead, 24
" " " " Littlejohn v Williams,
1819. Rev. c. 1016 Clancy v Craine, 363
1820, Rev. c. 1055 Freeman v Perry, 243
1822, Private Act c. 98. Free Bridge Company v Woodfin, 113

STATUTE OF FRAUDS.

Vide Contract for the Sale of Land, 1, 2.

STOCK IN THE ROANOKE NAVIGATION COMPANY.

Vide Legacy, 13, 17, 18.

SURETY.

1. If a creditor be bound to sue the principal at the request of a surety, his refusal does not discharge the surety, if no injury results to the latter—as where the principal debtor was insolvent, when the

liability of the surety was incurred.—*Bizzell* v *Smith*, 27
2. *It seems*, that the creditor is not bound to sue the principal debtor at the request of the surety. *Ibid.* 28
3. Upon the insolvency of the principal debtor, a surety is considered in equity as a creditor, and may retain, against an assignee for value and without notice, any funds of the principal which he has in his hands. *Battle* v *Hart*, 31
4. Where a testator died indebted to a bank, and his note was renewed by his executor, as executor, and afterwards discharged by a surety who became liable subsequently to the death of the testator, it was held that the surety had a right to be substituted to the claim of the executor and the bank against the assets; and the executor being in advance to the estate, by reason of the debt which the surety had paid, that balance was decreed to be paid to the latter in preference to a subsequent assignee of the executor. *Hart* v *Bryan*, 147
5. A deed obtained by securities for their indemnity, under a threat of legal process in case of refusal, cannot be set aside by the bargainor for duress in its execution. *Hunt* v *Bass*, 292

SURVIVORSHIP.

Vide Devise, 5, 6,—Legacy, 3, 4, 5, 6, 7, 8, 9, 10.

TENANT IN COMMON.

1. A tenant in common, in possession, is not protected by the statute of limitations from an account to his co-tenant of the rents and profits, until three years after a partition. *Wagstaff* v *Smith*, 264
2. Upon a bequest to children, as tenants in common, with a postponement of the division, in the absence of any direction to the contrary, the expenses of each is a separate charge upon his share of the profits. *Green* v *Cook et al.* 531

Vide Legacy, 8.

TRUST.

1. Where one who had become surety for an insolvent person, was, in order to obtain forbearance, compelled to convey his estate as a security for the debt, to a trustee nominated by the creditor, who also became assignee of the effects of the principal debtor, to secure the surety, *it was held*, that a subsequent agreement, whereby the surety gave the trustee one fourth of the estate of the principal debtor, as a compensation for managing it, was invalid. *Boyd* v *Hawkins*, 195
2. To prevent fraud, Courts of Equity do not permit trustees to purchase the trust estate at their own sales. *Ibid.* 207
3. The rule also forbids a trustee from purchasing for his own benefit, an incumbrance on the trust estate. *Ibid.* 207
4. And it extends to all persons standing in a fiduciary relation to the trustee. *Ibid.* 208
5. Bargains between trustee and *cestui que trust* are not void—but they are viewed with great jealousy. *Ibid.* 208
6. If they result from the connexion, they cannot be sustained. *Ibid.* 208
7. If a sale by *cestui que trust* to the trustee be the effect of the unbiassed judgment of the former, it must appear how this judgment was produced, and whether by pecuniary distress of which the trustee availed himself. *Ibid.* 209
8. A sale by the *cestui que trust* to the trustee, made while the connexion existed, the consideration of which was a discharge of duty by the trustee, cannot be supported. *Ibid.* 210
9. Especially where the trustee was one for sale, imposed upon the *cestui que trust* by his creditor, having all the influence of the latter. *Ibid.* 210
10. And where the *cestui que trust* was ignorant of the value of the estate sold, in distress, and confided in the friendship of the trustee. *Ibid.* 211
11. In this State, trustees are entitled to nothing but their expenses. *Ibid.* 211
12. A stipulation for compensation, made when the relation was contracted, will be supported, unless the trustee be one for sale, nominated by the creditor.—*Ibid.* 212
13. If subsequently arranged, it is only evidence that gratuitous services were not intended, and will not be regarded as a measure for its allowance. *Ibid.* 212

14. The purchase by a trustee of an incumbrance upon the trust estate, enures to the benefit of *cestui que trust*, and a sale of one fourth of the estate in consideration that the trustee will surrender the judgment, is made by *cestui que trust*, in ignorance of his right. *Ibid.* 213

15. And such a sale made, when the *cestui que trust* was in pecuniary distress, fearful of the sinister influence of the trustee, and under mistaken estimates of his services, cannot be supported. *Ibid.* 215

16. And a subsequent deed will not help it, unless the *cestui que trust* knew that the first was invalid, and intended the second as a confirmation. *Ibid.* 215

17. Where the property of a female was conveyed to trustees upon trust to permit her intended husband to receive the profits during his life, and then in trust for the wife and the issue of the marriage, a purchaser of a slave, part of the trust estate, under an execution against the husband, with notice of the articles, who held possession adversely to the trustees, more than three years during the life of the husband, and who to a bill filed by the wife and children within three years after his death, pleaded the statute of limitations, was held by DANIEL, Judge, to be a trustee for the plaintiffs, although he acquired nothing by the sale, as the plaintiffs were not guilty of any laches, and had a specific right to the slave. By HENDERSON, C. J. to stand in the place of the husband, and being a privy in estate, to be effected with the trust declared in the settlement. *Freeman et al.* v *Perry*, 243

18. A trustee who is obliged to employ an agent, and does so in good faith, is not responsible for any loss to the trust fund, arising from the subsequent insolvency of the agent. *Potts* v *Trotter*, 281

19. Property conveyed to a trustee for sale, and sold by him under an agreement with the vendee, to be jointly interested in the purchase, is subject to the original trust. *Hunt* v *Bass*, 295

20. A trustee for sale should be indifferent between the debtor and creditor and should not sell in disregard of the interest of the former, unless it was so agreed. *Ibid.* 296, 297

21. If a title of some of the trust property is disputed, he should not sell it until the rest is exhausted. *Ibid.* 297

22. And the debtor has a right to the trust property which has been improperly sold by him, and which afterwards comes to his hands, or those of his confederates, even if originally sold to one against whom he has no right to relief. *Ibid.* 297

23. Agreements between trustees and *cestui que trusts* are not void, but voidable, and *prima facie* require evidence of collateral facts to support them; and where a trustee had taken an assignment of a judgment which was a lien upon the trust estate, and he and the *cestui que trust* believing it could be used for his pecuniary advantage, agreed that it should be held for the benefit of the latter, and in consideration thereof, and as a compensation for his trouble, the former was allowed one fourth of the trust estate; it was held that the agreement being entered into by the *cestui que trust* under a mistake of his rights, was void. *Boyd* v *Hawkins*, 329

24. Bargains between trustees and *cestui que trusts* must be such as a prudent man would make, and which the former might conscientiously advise the latter to accept from a stranger. *Ibid.* 331

25. In England it is clear that trustees who are *quasi* officers of the law, as executors, &c. have no right to compensation, and by analogy the rule is extended to trustees by compact. *Ibid.* 334

26. But here by the act of 1799, (*Rev.c.* 326,) a different rule has been introduced as to executors, &c. And as equity follows the law, the rule as to trustees by compact is also altered. *Ibid.* 334–335

27. A *cestui que trust* has a right to relief in equity, when the trustee either refuses or neglects to assert his right at law. As where a partnership debt was

assigned to a deceased partner, and the residence of the survivor was unknown, so that a warrant of attorney to sue at law, could not be obtained, it was held that the executor of the deceased partner could recover the debt in equity.—*Drake* v *Blount*, 353

28. A partial payment by a trustee to his *cestui que trust* cannot under any circumstances, operate as a discharge of the residue. *Redmond* v *Coffin*, 442

Vide Execution and Execution sales, 3, 5. Executors and Administrators, 31, 37. Jurisdiction, 2, 3, 5—Lapse of time, 11, Vendor and Purchaser, 7, 8, 9.

USURY.

A Court of Equity is bound by the statute of usury, and although upon the bill of the borrower, aid will be extended only upon the terms of his repaying the sum lent with interest, yet the lender can have no relief whatever, and his bill to foreclose an usurious mortgage will be dismissed. *McBrayer* v *Roberts*, 75

VENDOR AND PURCHASER.

1. A vendor may complete his title, pending a suit to rescind the contract for defect of title, at any time before the hearing. *Clanton* v *Burges*, 13

2. It seems that a purchaser who has given a bond for the purchase money, and is in the undisturbed possession, will not be relieved against the bond on the ground of a defective title, there being no allegation of fraud in the sale. *Ibid.* 15

3. Where the land of the wife was conveyed by the husband to her separate use during life, remainder to the issue of the marriage—upon an executory contract by husband and wife, for a sale, a specific performance will not be decreed. *Ibid.* 16

4. But if the sale be executed, so minute an outstanding interest as the trust in favor of the children, depending upon the courtesy of the husband, will not vacate the contract. *Ibid.* 16

5. Where the vendee has taken his title, the court will not rescind the contract, because of a prior voluntary conveyance by the vendor, which is void against the vendee. *Ibid.* 16

6. Where executors having a power to sell lands, honestly made an arrangement with the widow of the testator to waive her right to dower, and sold with notice to the purchaser of the widow's claim—*held* that the latter was entitled to no relief, upon the widow's interposing her claim. *Wilson* v *White*, 29

7. A *bona fide* purchaser from a trustee, holding upon a personal confidence to sell the trust estate, receive the purchase money, and divide it among the *cestuis que trust*, is not bound to see to its application. *Hunt et al.* v *State Bank*, 60

8. A *bona fide* vendee, who has notice that there is a personal confidence between the trustee and *cestuis que trust*, to sell and divide the purchase money, is not affected by equities subsisting between the latter. *Ibid.* 64

9. And especially he is not bound to notice the right of the *cestuis que trust*, to portions of the purchase money, where their amount is disputed. *Ibid.* 64

10. A purchaser cannot call for the execution of a contract procured from a vendor while in a state of intoxication.—*Whitesides* v *Greenlee*, 152

11. The purchase money paid upon an agreement for the sale of land is, in equity, considered as land, and if the contract is vacated after the death of the vendee, it goes to the heir. *Tate* v *Conner*, 226

12. The Cape Fear Navigation Company having laid out a town and sold the lots, under the impression that they would open the navigation to it, and it turning out that the funds of the Company would not admit of it, whereby the lots were rendered worthless; but the Company having made no fraudulent concealment or representation of their means, they and the vendees being under an honest mistake—it was held that the latter could not be relieved. *Turner* v *Cape Fear Navigation Company*, 236

Vide Contract for the Sale of Land, 3,—Exchange,—Mistake,—Specific Execution.

WIDOW.

1. A widow whose husband made a provision for her out of his personal estate, is not entitled to dower, unless she dissent from the will within six months.—*Craven* v *Craven*, 338
2. The case of *Miller* v *Chambers* (manuscript) stated by GASTON, J. to establish that a widow is entitled to dower when her husband makes no provision for her, although she may not have entered her dissent from the will. *Ibid.* 342
3. A widow is entitled to a provision from both the real and personal estate of her husband, and however liberally he may have provided for her out of one, she may, by entering her dissent to his will, obtain her legal provision out of the other. *Ibid.* 343
4. Dower assigned to a widow, who dissents from her husband's will, is neither subject to debts nor legacies. *Bray* v *Lamb*, 374

WILL.

1. Upon the construction of a will reciting an intention to dispose "of what worldly estate," &c. and directing "that all my property consisting of lands, stock of every kind, household and kitchen furniture, wagons, farming tools," should be sold at public sale, and disposing of the sale; and in another clause directing the sale of slaves, but making no disposition of the proceeds—it was held that the words "*all my property*" were qualified by the words "*consisting of*," and restrained to the enumerated subjects, and that the sales of the slaves went to the next of kin. *Fraser* v *Alexander*, 348
2. Can a mistake in drafting a will, appearing either upon proofs or the answer of the next of kin, be corrected. Qu! *Ibid.* 349
3. The obvious meaning of words used by a testator may be controlled by a natural implication arising from the circumstances under which the will was made, or the absurdities resulting from a strict construction. As where a testator disposed of all his estate, giving the larger portion to his wife, and a smaller to a daughter, then his only child, and upon the birth of a son, by a codicil declared "I revoke and make void the said legacy to my wife," and then gave one moiety of it to his son, and made no disposition of the other—it was held that his intention was to revoke the legacy to his wife only for one half, so as to make her a joint-tenant with his son. *Jones* v *Jones*, 387
4. A codicil by which the testator intended to revoke a former, and make a new disposition of property, is not effectual as a revocation, unless it be effectual as to the new disposition of the same property. *Ibid.* 392
5. In a will, the words "all my property" include bonds as well as notes, but not judgments upon either. *Perry* v *Moorewell*, 496

Vide Accounts,—Legacy, *passim*.—Power, 1, 2.

WITNESS.

Vide Evidence, 3,—Parties to a Suit, 2.